(3) Supreme Court, U.S
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No. _____

In The
Supreme Court of the United States
October Term, 2004

DIANE SANK,

Petitioner,

v.

THE CITY UNIVERSITY OF NEW YORK, ET AL,

Respondents.

On Petition for a Writ of Certiorari
To the United States Court of Appeals
For the Second Circuit

APPENDIX B, pp. 111a-200a
TO PETITION FOR WRIT OF CERTIORARI

Diane Sank
Petitioner *Pro Se*
173 Charlotte Place
Englewood Cliffs, NJ 07632
(201) 569-7297

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION
94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF
NEW YORK, JOSEPH MURPHEY,
et al.,

Defendants.
----------X

APPEARANCES:

DIANE SANK
Plaintiff [Pro Se]
173 Charlotte Place
Englewood Cliffs, NJ 07632

MARSHA RUBIN
G. OLIVER KOPELL
Attorney General of the State of New York
Attorney for Defendants
120 Broadway
New York, NY 10271
By Marsha Rubin

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Sweet, D.J.,

Defendants City University of New York ("CUNY"), City College of the City of New York ("CCNY") and Beverly Sowande ("Sowande") have moved pursuant to Rule 56 of the

Federal Rules of Civil Procedure for summary judgment and pursuant to Fed. R. Civ. P. 39(a) to strike the jury demand of Plaintiff Diane Sank ("Sank "). Sank cross moved under Fed. R. Civ. P. 56(f) to deny or postpone the summary judgment motion until she is able to complete necessary discovery.

Sank has filed this action pursuant to Title VII of the Civil Rights Act of 1964 ("Title VII"), codified at 42 U.S.C. §§ 2000e et seq., alleging that defendants removed her as chairperson of the Anthropology Department based on her gender, race, religion, and age, and retaliated against her after she filed a complaint of discrimination with the New York City Human Rights Commission. Plaintiff also alleges a violation of New York's Freedom of Information Law ("FOIL"), N.Y. Pub. Officers L. § 84 et seq., and breach of contract.

For the reasons below, Sank's Rule 56(f) motion is granted as to her Title VII claims, but denied as to her other

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claims. As to the other claims, the defendants' motion for summary judgment is granted. The defendant's Rule 39 (a) motion is also granted.

Parties

Pro se plaintiff Sank is a white Jewish woman, over the age of 66, who walks with the aid of a cane and uses a wheeled luggage cart due to a disability resulting from an accident in 1985. Sank is a Professor of Anthropology who has been employed by CCNY since 1968. Sank is a resident of New Jersey and a citizen of the United States.

CUNY is a public higher education system comprised of several senior and community colleges throughout New York City and its boroughs.

CCNY is one of the colleges that makes up CUNY.

Sowande, Associate Counsel in CUNY's General Counsel's Office, was the CUNY Freedom of Information Appeals Officer.

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Facts

The facts below are drawn from the plaintiff's complaint, the defendants' summary judgment motion and previous opinions of this Court. Plaintiff has not yet submitted a statement of undisputed facts, and the facts below are not limited to undisputed facts.

From 1969 to 1972, Sank served as chairperson of the CCNY Anthropology Department (the "Department"). After her term, faculty members Eleanor Leacock and June Nash each served as chairperson for alternate terms from 1972 to 1987. Both Leacock and Nash are white females.

Early in 1987, Dr. Charlene McDermott, the provost of CCNY, initiated a college-wide review of departments, including the Department. As part of this process, Sank and other members of the Department selected two outside anthropologists to evaluate the Department in December 1987.

In May 1987, the six full-time faculty members of the Department elected Sank to a three-year term as departmental chairperson. Plaintiff's salary did not change as a result of her election. Instead, Sank received a reduction in her teaching

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duties in order to accommodate the administrative functions the chairperson was required to perform. Sank claims that prior to the election CCNY President Bernard W. Harleston ("Harleston") threatened to shut down the Department because

it contained no black faculty, and that she was elected to address this issue.

On December 3 and 4, 1987, the two outside anthropologists, Professor Owen Lynch of New York University and Professor William Pollitzer of the University of North Carolina, toured the Department. Sank organized the visit, escorting the reviewers through the library and facilities and scheduling interviews between the reviewers and each faculty member.

Lynch and Pollitzer released a report on January 13, 1988 (the "Report") based on their observations at CCNY. They stated:

> Unfortunately, and perhaps in part because of their individual accomplishments, the members of the department are unable to cooperate and govern themselves. Over the years mutual distrust has grown because of personal misunderstandings, misinterpretations, and misperceptions of the interests and intentions of one another. During her tenure, Prof. Leacock was able to hold these problems in check and was a focus whom all respected and trusted. Her departure left the department to its own self-destructive devices. Unable to govern itself it turned to Prof. Sank to rescue it by electing her Chair. Unfortunately, immediately after her election she, too, being a member of the family, became a victim of its collective neurosis. Despite her sincere efforts to create a new morale, to
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>
> promote student enrollment and department publicity, to seek from the administration added funds, and to write the departmental assessment for our review, the department which elected her withdrew its collective

support. Without that support it has been impossible for her to accomplish anything and she had been reduced to a symbol of the department's collective malaise. The responsibility for the department's present distemper, disarray, and drift is that of the department as a whole.

The reviewers proposed "an immediate, but interim, solution of semi-receivership for the department." They recommended that an anthropologist from CUNY's Graduate Center be appointed as an interim chairperson with responsibility for initiating a search for an outside educator to serve as chairperson. The Report specifically identified Professors Dell Jones ("Jones") and Jane Schneider ("Schneider") from the CUNY Graduate Center and Professor Lucie Saunders ("Saunder") from Lehman College as good candidates for the interim post. Jones is a black male; Schneider and Saunders are white females.

On February 8, 1997, the Department held a special faculty meeting to discuss the findings and recommendations set forth in the Report. The meeting ended without a clear consensus on an appropriate course of action. However, three of the six faculty members (Professors Fremont Besmer ("Besmer"), Warren Kinzey ("Kinzey"), and June Nash ("Nash")) voted to recognize the "immediate need for outside advisory input to the Department,"

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and recommended that "Prof. Dell Jones be, or be among those who provide, that advising input."

The Department later submitted two separate responses to the Report to the CCNY Provost. Sank submitted the official response on February 16, 1988. It recognized the division in the anthropology faculty but concluded that a semi-receivership would be "an illegal, dangerous precedent and is unwarranted." Four of the six faculty members submitted a

separate memorandum to the CCNY Provost, recommending that Jones immediately replace Sank as chairperson.

Harleston subsequently met with the Department to discuss the proposal to appoint a new chairperson. Three of the five faculty members present voiced their approval of the recommendation. Plaintiff and Professor Arthur Spears dissented. Nash, who had supported Sank's removal in the February 18, 1998 response to the Report, was not present at the meeting.

On April 27, 1988, Harleston wrote to Joseph Murphy, the CUNY Chancellor at the time, stating his decision to remove Sank as chairperson effective June 1, 1988 and to recommend that the Board of Trustees appoint Jones as acting chairperson for the period from June 1, 1988 through August 31, 1989. Harleston sent

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a separate letter to Sank informing her of his decision. In 1988, the CUNY By-laws permitted CCNY's president to remove a departmental chairperson "as the interests of the college may require" after conferring with members of the department. Sank claims that this incident was the first time in CCNY's history that a department chair was removed, rather than quietly asked to resign.

On May 11, 1988, the office of the Ombudsman at CCNY wrote to Harleston expressing surprise at his having taken action with respect to Sank prior to meeting with the Ombudsman. That letter announced a May 18, 1988 faculty meeting to consider the matter of the President's actions with respect to Sank and the Department.

Sank promptly pursued administrative remedies complaining about her removal. After being informed in a letter dated May 24, 1988 that the Professional Staff Congress

of CCNY would not take the complaint to grievance because "it lacked merit," Sank filed a Step One Grievance against Harleston, the Provost, and the Dean of Social Science of CCNY for improperly removing her as Department chair. This letter did not mention

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allegations of discrimination.[1]

Sank filed a complaint with the New York City Human Rights Commission in late August 1988 (the "Commission"). On October 21, 1989, Sank filed a verified complaint with the Commission charging CUNY, CCNY and Harleston with sex discrimination. A copy of the verified complaint was filed with the Equal Employment Opportunities Commission ("EEOC") on September 12, 1989 for dual filing purposes.

On October 13, 1988, Sank was informed by letter that her grievance had been rejected. On December 9, 1988, Sank received a letter from the CCNY Acting Director of Affirmative Action advising her that "the Grievance Committee has not found a basis for your grievance of gender discrimination."

On June 8, 1989, the Department held a meeting to elect a new Chairperson, as Jones declined reappointment. The vote was to appoint Besmer, a white male.[2]

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[1] A September 15, 1988 letter from Sank to the CCNY Dean of Faculty and Staff Relations makes reference to her enclosure of a report on The Status of Women and Faculty Appointment at CUNY.

[2] There was a lack of an appropriate quorum however. The lack of quorum was successfully challenged through the University grievance process. In September Besmer was properly appointed.

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On June 27, 1989, Sank filed an amendment to her verified complaint with the Commission, adding charges of race discrimination.

On July 13, 1989, as part of a campus wide modernization project,[3] the architect in charge, Anthony Rodriguez ("Rodriguez")[4] issued a memorandum setting forth a schedule for the reallocation of a significant amount of space within seven buildings at CCNY. As part of this reallocation of space, the Department lost the use of two rooms to the Department of Computer Science, including the room housing the plaintiff's research laboratory ("NAC 7/105"). According to the memorandum, the contents of NAC 7/105 and NAC 7/106, the other room lost by the Department, were to be packed and moved into NAC 7/103, a remaining Department room, on July 23-24, 1989. At the time Rodriguez issued the memorandum, he claims he did not know Sank and had no knowledge of her claims of discrimination.

[3] As part of the project, the college was forced to vacate between 400,000 and 500,000 square feet, or approximately 20 to 25 % of the total campus space of two million square feet.

[4] Rodriguez made the ultimate decision on space allocation. However, he would routinely report his recommendations to the Space Advisory Committee, comprised of deans, faculty members, and administrative employees. The role of the committee was to provide Rodriguez with feedback and to keep the CCNY community informed of the renovation progress.

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Besmer, as acting chairperson, sent Sank a memorandum dated July 20, 1989 notifying her of the impending move. Sank testified that she received the letter, at her house, on July 27, 1989 - after the contents of her laboratory had already been packed and moved across the hall into NAC 7/103. She claims that the laboratory contained invaluable, irreplaceable contents, many of which were her own personal property. Further, she claims that a 1989-90

faculty investigation determined that the administration did not have to take and should not have taken her laboratory.

Sank was offered assistance to recreate her laboratory in NAC 7/103. Sank did not recreate it, however, and in 1991, the Department permitted Kinzey to set up a laboratory there.

On August 8, 1989, Sank again amended the complaint to allege the retaliatory seizure and dismantling of her laboratory in July 1989. She named Rodriguez as a person with whom she discussed the dismantling and stated that "he refused to give me back my lab room, even though there are alternative rooms to use for other departments." Correspondence between Sank and the Commission and Rodriguez and Sank discuss his role in the decision to move her lab. Rodriguez was not added to the caption. (In the Court Complaint, Sank alleges he, along

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with three school officials, were all responsible for the retaliatory actions and her failure to be warned of the same.)

On March 3, 1990, she amended the Commission Complaint to add Besmer, the new Department Chair, who Sank alleges threatened to take her research computer for his own use. Sank alleged in her Commission Complaint that Besmer's actions were his way of thanking Harleston for appointing him as acting Chair.

Throughout and after the period she was filing and amending her Commission complaint, Sank sought information through FOIL from CCNY and CUNY officials. The first letter request was on June 9, 1988, and the last on January 2, 1992.

On July 24, 1991, the Investigator at the Commission indicated on a file memorandum regarding Sank's complaint

that there was probable cause and forwarded the complaint to the Commission's Enforcement Bureau.

The Commission issued a written determination and order on January 22, 1993, finding "no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged . . . ." Sank unsuccessfully appealed the Commission's decision to the EEOC, which, according to the Complaint,

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rejected the appeal without explanation.

On October 19, 1993, the EEOC issued a determination concurring with the conclusions of the Commission and granting Sank the right to sue within 90 days.

Sank filed her complaint in this Court on January 18, 1994, and an amended complaint (the "Complaint") was filed on May 27, 1994. By decision dated May 23, 1995, this Court granted, in part, defendants' motion pursuant to Fed. R. Civ. P. 12(b)(1), dismissing (1) plaintiff's claims of discrimination based on age, religion, and disability, (2) plaintiff's Title VII claims against Sowande and the CUNY Board of Trustees, and (3) all of plaintiff's claims under 42 U.S.C. § 1983. Sank v. CUNY, 1995 U.S. Dist. LEXIS 7021, No. 94 Civ. 0253, 1995 WL 314696 (S.D.N.Y. May 24, 1995). Plaintiff's motion for reconsideration of the May 23, 1995 decision was denied. Sank v. CUNY, 1997 U.S. Dist. LEXIS 1468, No. 94 Civ. 0253, (S.D.N.Y. Feb. 13, 1997).

Subsequently, individual defendants moved to dismiss the Title VII claims against them in light of the Second Circuit's holding in Tomka v. Seiler Corp., 66 F.3d 1295 (2d Cir. 1995). This motion was granted on June 25, 1997. Sank v. CUNY, 1997 U.S. Dist. LEXIS 9045, 1997 WL 362150 (S.D.N.Y. June 26, 1997).

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Accordingly, the only claims remaining in this action are (1) Title VII claims against CUNY and CCNY for gender and race discrimination and retaliation; (2) a state FOIL claim against defendant Sowande; and (3) a state contract law claim against CUNY and CCNY.

Defendants filed the instant motion on April 13, 2001. They allege that plaintiff has failed to present evidence from which a trier of fact could infer a violation of her rights under Title VII and that this Court lacks subject matter jurisdiction over plaintiff's state law claims. Finally, should plaintiff 's claim survive summary judgment, the Defendants claim plaintiff has no right to trial by jury or recovery of monetary damages or back pay.

A discovery dispute arose in the fall, and on October 9, 2001, this Court ordered that, "Defendant shall permit plaintiff and her son, Brian Firschein, to access and review the personnel records of current and past employees of the City College of the City University of New York during regular business hours in the presence of a City College employee. However, in accessing these personnel records, plaintiff may only review, copy or record information pertaining to an employee's hiring date, separation date, race, gender, and current (or last

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known) address." Order, October 9, 2001.

Following this Court's order, Sank's access to personnel records was limited to four specific dates (two of which were concurrent with classes Sank was teaching, as CCNY would have knowledge of); for a duration of three hours or less; and in a room that was used for other purposes and thus not available during other regular hours. Moreover, pursuant to the Order, Sank could only review records in the

presence of a City College administrative employee. That employee was often unavailable, further limiting Sank's access to personnel records.

In addition to these limitations, defendants did not produce all the documents that they were ordered to produce. Some of the personnel records lacked any specification of race or gender - both of which are integral to Sank 's contentions in this case. In at least one instance, data relating to several different employees was commingled in a single folder - despite the fact that the defendants are very unlikely to have kept the records that way in the ordinary course of business. Sank requested more of the materials from a school official, who has yet to comply with most of those requests.

On November 26, 2001, plaintiff filed a declaration in
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support of a motion under Rule 56(f) to deny or postpone summary judgment. The motion was deemed fully submitted on February 27, 2002.

Standard of Review

Rule 56(e) of the Federal Rules of Civil Procedure provides that a court shall grant a motion for summary judgment "if the pleadings, depositions, answers to interrogatories, and admissions on file, together with affidavits . . . show that there is no genuine issue as to material fact and that the moving party is entitled to a judgment as a matter of law." Fed. R. Civ. P. 56(e); Celotex Corp. v. Catrett, 477 U.S. 317, 91 L. Ed. 2d 265, 106 S. Ct. 2548 (1986); Silver v. City Univ., 947 F.2d 1021, 1022 (2d Cir. 1991). "The party seeking summary judgment bears the burden of establishing that no genuine issue of material fact exists and that the undisputed facts establish her right to judgment as a matter of law." Rodriguez v. City of New York, 72 F.3d 1051, 1060-61 (2d

Cir. 1995). In determining whether a genuine issue of material fact exists, a court must resolve all ambiguities and draw all reasonable inferences against the moving party. Matsushita Elec. Indus. Co. v. Zenith Radio Corp., 475 U.S. 574, 587, 89 L. Ed. 2d 538, 106 S. Ct. 1348 (1986); Gibbs-Alfano v. Burton, 281 F.3d 12, 18 (2d Cir. 2002).

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Discussion

I. Sank's Motion Under Rule 56(f).

In addressing the present motion, the Court is mindful that the plaintiff is proceeding pro se and that her submissions should be held "'to less stringent standards than formal pleadings drafted by lawyers. . . .'" Hughes v. Rowe, 449 U.S. 5, 9, 101 S. Ct. 173, 176, 66 L. Ed. 2d 163 (1980) (per curiam) (quoting Haines v. Kerner, 404 U.S. 519, 520, 92 S. Ct. 594, 595, 30 L. Ed. 2d 652 (1972)); see also Ferran v. Town of Nassau, 11 F.3d 21, 22 (2d Cir. 1993). The Court recognizes that it must make reasonable allowances so that a pro se plaintiff does not forfeit rights by virtue of lack of legal training. Traguth v. Zuck, 710 F.2d 90, 94 (2d Cir. 1983).

Indeed, district courts should "read the pleadings of a pro se plaintiff liberally and interpret them to raise the strongest arguments they suggest.'" McPherson v. Coombe, 174 F.3d 276, 280 (2d Cir. 1999) (quoting Burgos v. Hopkins, 14 F.3d 787, 790 (2d Cir. 1994). Nevertheless, the Court is also aware that pro se statute "'does not exempt a party from compliance with relevant rules of procedural and substantive law." Traguth, 710 F.2d at 95 (quotations omitted).

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Sank has filed a declaration under Fed. R. Civ. P. 56(f) seeking an order denying defendants' motion for summary judgment and compelling defendants to provide certain discovery. That rule states that:

> Should it appear from the affidavits of a party opposing the motion that the party cannot for reasons stated present by affidavit facts essential to justify the party's opposition, the court may refuse the application for judgment or may order a continuance to permit affidavits to be obtained or depositions to be taken or discovery to be had or may make such other order as is just.

Courts have interpreted Rule 56(f) to provide that when a party facing an adversary's motion for summary judgment reasonably advises the court that it needs discovery to be able to present facts needed to defend the motion, the court should defer decision of the motion until the party has had the opportunity to take discovery and rebut the motion. Commercial Cleaning Servs, L.L.C. v. Colin Serv. Systems, Inc., 271 F.2d 374, 386 (2d Cir. 2001) (citing Meloff v. New York Life Ins. Co., 51 F.3d 372, 375 (2d Cir. 1995) (holding that grant of judgment was premature where plaintiff submitted properly supported Rule 56(f) request for further discovery in opposition to defendant's motion for summary judgment); Hellstrom v. U.S. Dep't of Veterans Affairs, 201 F.3d 94, 97 (2d Cir. 2000) ("Only in the rarest cases may summary judgment be granted against a plaintiff who has not been afforded the opportunity to conduct

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discovery.")). The district court is afforded discretion in making this decision. Id.

The Second Circuit has established a four-part test to determine the sufficiency of an affidavit or declaration submitted pursuant to Rule 56(f). The affidavit or declaration must detail: (1) the nature of the uncompleted discovery; (2) how the facts sought are reasonably expected to create a genuine issue of material fact; (3) what efforts the affiant as

made to obtain those facts; and (4) why those efforts were unsuccessful. Paddington Partners v. Bouchard, 34 F.3d 1132, 1138 (2d Cir. 1994); Hudson River Sloop Clearwater, Inc. v. Dep't of the Navy, 891 F.2d 414, 422 (2d Cir. 1989).

Sank alleges that defendants have obstructed her ability to access personnel records for several hundred employees of CUNY for whom she seeks information regarding their hiring dates, race, gender, and current addresses. She also alleges that defendants interfered with her ability to depose Harleston. Defendants claim that they have provided Sank with the material she requested and that she is bound by the discovery requests of her former attorney.

A. Actions of Sank's Former Attorney

Defendants argue that Sank should be bound by the discovery requests by her former attorney.

It is true that clients are bound by the acts or omissions of their attorneys. Pioneer Investment Serv. Co. v. Brunswick, 507 U.S. 380, 397, 123 L. Ed. 2d 74, 113 S. Ct. 1489 (1993) (citing Link v. Wabash R. Co., 370 U.S. 626, 633, 8 L. Ed. 2d 734, 82 S. Ct. 1386 (1962)) (finding that clients are bound by their attorney's omission in not filing a claim under bankruptcy law); United States v. Cirami, 535 F.2d 736, 741 (2d Cir. 1976) (affirming summary judgment against client despite claims of attorney misconduct); Trehern v. OMI Corp., 1999 U.S. Dist. LEXIS 919, at *9, No. 98 Civ. 0242 (S.D.N.Y. Feb. 1, 1999) (denying plaintiff's motion for change of venue where he claimed that he did not know that his former attorney had filed suit in New York).

As discussed below, Sank seeks only discovery that she herself has already requested[5] and that this Court has already

[5] As early as September 1997, while prosecuting the action pro se, Sank requested "the race and gender of certain administrators and faculty personnel at City College, their qualifications (e.g. as indicated by their curriculum vitaes), as well as their titles and faculty ranks, status (permanent or acting), dates of appointment, promotion, permitted leave(s), and (if applicable) resignation/termination from their positions (as well as the reasons therefor, if known), and any changes therein, as well as the names of the officials who made each such appointment, promotion, etc." Sank letter, October 22, 2001.

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ordered.[6] The actions of her former attorney, and the extent to which they bind her, are not at issue. What is at issue is whether the defendants have complied with this Court's October 9, 2001 order so that Sank could fairly respond to their motion for summary judgment.

B. Deposing Harleston

Sank complained in her cross motion of defendants' obstructions to her deposition of Harleston. Because Sank has taken that deposition, this issue is moot.

C. Personnel Records

It does not appear as though Sank has had a reasonable opportunity to obtain access to personnel records that she had requested and that this Court ordered made available to her.

On October 9, 2001, this Court ordered that the

6 On October 9, 2001, This Court ordered that "Defendant shall permit plaintiff and her son, Brian Firschein, to access and review the personnel records of current and past employees of the City College of the City University of New York during regular business hours in the presence of a City College employee. However, in accessing these personnel records, plaintiff may only review, copy or record information pertaining to an employee's hiring date, separation date, race, gender, and current (or last known) address." Order, October 9, 2001.

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defendants allow Sank and her son access to personnel records. The defendants allowed Sank the ordered access, but for such constricted periods of time that she did not have sufficient time to complete her discovery. In effect, Sank had two three-hour periods, on different days, when she could sift through records. In addition, some of the personnel records lacked any specification of race or gender - both of which are integral to Sank's contentions in this case. In at least one instance, data relating to several different employees was commingled in a single folder - despite the fact that the defendants are very unlikely to have kept the records that way in the ordinary course of business. Sank has requested more of the materials that defendants were ordered to produce from a school official, who has yet to comply with most of those requests.

Defendants claimed in a memorandum dated December 21, 2001, that Sank should have had access to the materials as of January 11, 2002. Sank's sur-reply to this memorandum is dated February 25, 2002. In it, she states that "Defendants have yet to make available to me the actual personnel files for any of the individuals I have been able to identify . . . ." Pl.'s Sur-Reply at 5. She also lists other documents that defendants have still failed to produce.

Access to these personnel materials would be integral

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to Sank's preparing a defense to the defendants' motion for summary judgment on Sank's Title VII claims.[7] She disputes the fact that the decision to remove her from her chairpersonship was not based on any illegitimate factors. The records she seeks could aid her argument in that regard. For instance, Sank claims that no one else in the history of CCNY had ever been removed as Chair (rather than asked to resign). These records could support or rebut that contention. In

addition, she claims that CCNY impermissibly promoted persons on the basis of race and sex; she can only support her contentions by determining the races and sexes of persons who received appointments.

Therefore, summary judgment on the matter of Sank's Title VII claims will be dismissed. A pre-trial conference will be held to address the specifics of Sank 's remaining request and clarify what records are available and what records Sank seeks.

However, defendants' arguments regarding the Eleventh Amendment and FOIL do not rely on these disputed issues of material fact. Therefore, the Court will address the other contentions.

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[7] Defendants argue that Sank, a pro se plaintiff, did not "state with clarity" what additional facts she sought or why they would raise a genuine issue of material fact. Defs.' Mem. at 3. However, reading her submission liberally and interpreting it to raise the strongest arguments it suggests, the Court finds that Sank did address these aspects. McPherson, 174 F.3d at 280.

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II. The Eleventh Amendment Bars Sank's Breach of Contract Claim.

The Eleventh Amendment limits the ability of federal courts to entertain suits brought against the states, regardless of the relief sought, unless the state consents to be sued, or Congress enacts legislation overriding the state's Eleventh Amendment immunity. Papasan v. Allain, 478 U.S. 265, 276, 92 L. Ed. 2d 209, 106 S. Ct. 2932 (1986); Pennhurst State School and Hospital v. Halderman, 465 U.S. 89, 99, 104 S. Ct. 900, 79 L. Ed. 2d 67 (1984).

It has been established that CUNY's senior colleges are arms of the State entitled to Eleventh Amendment immunity. Hester-Bey v. New York City Technical College, 2000 U.S.

Dist. LEXIS 5323, at *11, No. 98 Civ. 5129 (E.D.N.Y. March 24, 2000) (holding that because senior colleges are "funded and administered by the State to a great degree," they constitute an arm of the State and are immune from suit under the Eleventh Amendment); see also Becker v. CUNY, 94 F. Supp. 2d 487, 490 (S.D.N.Y. 2000) (holding that CUNY's central administration, like CUNY's senior colleges, possesses Eleventh Amendment immunity as an arm of the State). Thus defendants CUNY and CCNY are entitled to Eleventh Amendment immunity.

This does not end our inquiry, however. The State may nonetheless consent to suit in the federal courts. If it does

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not, however, this Court cannot hear Sank 's claims. A number of courts have held that the State has not consented to suit for breach of contract claims and thus held that federal courts lacked jurisdiction to hear breach of contract claims against state entities, including CUNY. E.g., Burrell v. CUNY, 995 F. Supp. 398, 415 (S.D.N.Y. 1998); Jungels v. SUNY, 922 F. Supp. 779, 787 (W.D.N.Y. 1996).

The Burrell court also made the instructive point that, even if the Eleventh Amendment did not exist, this court could not entertain jurisdiction of a breach of contract claim against one of New York's "senior colleges." The New York Court of Claims has exclusive jurisdiction over such claims. N.Y. Educ. Law § 6224(4); see also Illickal v. Roman, 236 A.D.2d 247, 248, 653 N.Y.S.2d 562, 563 (1st Dep't 1997) (dismissing breach of contract claim against medical school).

The breach of contract claim therefore is dismissed.

III. The FOIL Claim Is Dismissed in Part

Sank's claim against Sowande does not face the same Eleventh Amendment bar discussed above. However, FOIL claims are limited to seeking injunctive, rather than monetary relief, through a specified procedure in the state courts.

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The Eleventh Amendment does not bar State law claims against State officials in their individual capacities that seek money damages or prospective injunctive relief. Huang v. Johnson, 251 F.3d 65, 70 (2d Cir. 2001); Dwyer v. Regan, 777 F.2d 825, 835 (2d Cir. 1985). Sank sued Sowande "individually and in her official capacity . . . ." Amended Compl. at 2. Therefore, the Eleventh Amendment presents no bar to Sank's claim against Sowande in her individual capacity for money damages or for prospective injunctive relief.

As with the breach of contract claim above, however, the Eleventh Amendment is not the only hurdle Sank has to clear. FOIL does not give rise to a private cause of action to recover money damages. Warburton v. State, 173 Misc. 2d 879, 881-82, 662 N.Y.S.2d 706, 708 (N.Y. Ct. Cl. 1997). In the event that access to a record is denied, the affected person may bring a C.P.L.R. Article 78 proceeding, and may be awarded reasonable attorney's fees and litigation costs. Id. Criminal sanctions may also ensue. Id. "Here, the Legislature has given a civil remedy by way of an article 78 proceeding with counsel fees and court costs available, as well as a criminal sanction. To go beyond those remedies and create a private cause of action for money damages for a violation of FOIL would be an improper usurpation of the legislative function, a step the Court declines to take." Id.

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It is unclear what remedy Sank seeks from Sowande. She may only seek injunctive relief pursuant to FOIL, and the Eleventh Amendment limits the injunctive relief she can obtain to prospective relief. Thus, to the extent that Sank seeks

something other than prospective injunctive relief against Sowande, this claim is dismissed.

IV. Trial by Jury and Money Damages

Prior to the enactment of the Civil Rights Act of 1991 ("1991 Act"), plaintiffs bringing claims of discrimination under Title VII were limited to equitable relief - typically reinstatement and back pay - and were not entitled to a jury trial. Patterson v. McLean Credit Union, 491 U.S. 164, 182, n. 4, 105 L. Ed. 2d 132, 109 S. Ct. 2363 (1989); see also 105 Stat. 1071-80 (1991).

In Landgraf v. USI Film Prods., 511 U.S. 244, 128 L. Ed. 2d 229, 114 S. Ct. 1483 (1994), the Supreme Court addressed the issue of whether those provisions of the 1991 Act authorizing recovery of compensatory and punitive damages, as well as trial by jury, for Title VII claims applied to cases pending when it became law. Landsgraf, 511 U.S. at 249-50. The Court held that the provisions were not retroactive. Id. at 286. Accordingly, Title VII plaintiffs cannot recover compensatory or punitive damages for events arising before

[page 28]

November 21, 1991, the effective date of the 1991 Act. Id. at 283, 286; Joseph v. New York City Bd. of Educ., 171 F.3d 87, 91 (2d Cir. 1999).

The latest conduct that Sank complained of occurred in 1990. Plaintiff therefore is not entitled to a trial by jury or an award of compensatory or punitive damages for her Title VII claim. Moreover, with respect to Sank's claims for injunctive relief, it is undisputed that she suffered no loss of wages or other pay as result of her removal as department chairperson. She is therefore not entitled to an award of back or future pay.

Conclusion

For the foregoing reasons, the plaintiff's Rule 56 (f) motion is granted in part and denied in part; the defendants' motion for summary judgment is granted in part and denied in part; and the defendants' Rule 39 (a) motion is granted. A pre-trial conference is ordered for April 10, 2002, at noon, in Courtroom 18-C, to discuss Sank's remaining discovery requests.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

Dated: New York, New York
April 2 2002

FILED: April 5, 2002
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 5928 (S.D.N.Y. 4/5/2002)

LETTER MEMO FOR CERTIFICATION OF *TOMKA* ISSUE WITH HANDWRITTEN ORDER DENYING REQUEST

/HANDWRITTEN ORDER/ *Treating this letter as a motion to reargue or to certify an appeal from the June 25, 1997 order of the court, it is denied with trial anticipated as directed in the fall of 1997. It is so ordered. /signed/ J Sweet USDJ 7-14-97*

Prof. Diane Sank
173 Charlotte Pl.
Englewood Cliffs, N.J. 17632
(201) 567-7925

July 7, 1997

BY FAX: (212) 805-7925

Honorable Robert W. Sweet
United States District Court
Southern District of New York
500 Pearl Street, Room 1920
New York, NY 10007

Re: Diane Sank v. The City University of New York, et al., 94 Civ. 0253 (RWS)

Dear Judge Sweet:

Please again excuse my use of a letter format and your fax facilities to deliver this to you, but since there is little time for me to (subsequent pages omitted as irrelevant to this Petitioner's Writ)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION
94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF
NEW YORK, et al.,

Defendants.
----------X.

APPEARANCES:

PROF. DIANE SANK
Plaintiff Pro Se
173 Charlotte Place
Englewood Cliffs, NJ 07632

HON. DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Moving Defendants
120 Broadway
New York, NY 10271
By MARSHA RUBIN, Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

The individual defendants, former Chancellor Joseph Murphy, Chancellor W. Ann Reynolds, and the individual members of the Board of Trustees of the City University of New York ("CUNY"), as constituted through the years 1988 through1990, have moved on the authority of Tomka v. Seiler Corp., 66 F.3d 1295 (2dCir. 1995), to dismiss the claims of

pro se plaintiff Diane Sank ("Sank")against remaining individual defendants alleging sex and race discrimination and retaliation in connection with Sank's demotion. For the reasons set forth below,the motion is granted, and a discovery and trial schedule is determined.

Parties

Pro se plaintiff Sank is a white Jewish woman, over the age of 66, who walks with the aid of a cane and uses a wheeled luggage cart due to a disability resulting from an accident in 1985. Sank is a Professor of Anthropology who has been employed as such by the City College of the City of New York ("CCNY") since1968. She was the elected Chair of CCNY's Anthropology Department for a three year term beginning on July 1, 1987. She served in that capacity until June 1,1988. Sank is a resident of New Jersey and a citizen of the United States.

[page 2]

Defendant Joseph Murphy ("Murphy") was the Chancellor of CUNY from 1987 to1990.

Defendant W. Ann Reynolds ("Reynolds") replaced Joseph Murphy as Chancellor of CUNY in September 1990.

The Board of Trustees of CUNY and its members in 1988 through 1990 includes all of the individual trustees.

Prior Proceedings

This action was commenced by Sank on January 18, 1994, alleging Title VII and Americans with Disabilities Act violations. By an opinion of May 24, 1995certain of the claims were dismissed for failure to exhaust her remedies before the Equal Employment Opportunities Commission ("EEOC"), and, based on the same reasoning, dismissed Sank's Title VII claims against defendants Dr. Beverly Sowande and the Board of Trustees of the City University of New York (the

"Trustees") for the years of 1991 and 1992. See Sank v. City University of NewYork, 1995 U.S. Dist. LEXIS 7021, 1995 WL 314696 (S.D.N.Y. May 24, 1995) (the "May 24 Opinion"). By order of November 10, 1995 (the "November 10 Order"), theCity Commission of Human Rights defendants were dismissed from the action. By opinion of February 13, 1997, the motion of Sank for reconsideration of the May24 Opinion and the November 10 Order was denied. See Sank v. City University of New York, 1997 U.S. Dist. LEXIS 1468, 1997 WL 65910 (S.D.N.Y. 1997) (the "February 13

[page 3]

Opinion"). On April 4, 1997, Sank's motion for certification of an interlocutory appeal from the February 13 Opinion was denied. Familiarity with these opinions and order is assumed.

On April 8, 1997, the Board of Trustee defendants by letter requested a conference to consider a motion to dismiss Sank's claims against the remaining individual defendants on the grounds of Tomka, supra, as well as Sank's requests for discovery. This was treated as a motion and filed. Sank was granted time to respond to the letter motion, did so, and on May 7, 1997 the motion was considered fully submitted.

The Facts

As more fully set forth in the prior opinions and order, the moving defendants were members of the Board of Trustees during the period of the events which gave rise to Sank's claim. The grievance and the subsequent proceedings including this action arose out of Sank's demotion as the elected Chair of the Anthropology Department of the City College of New York ("CCNY") in 1988, her subsequent removal in 1989, and certain following acts alleged to be retaliatory in nature. Her grievance stemming from her demotion rose to the Board of Trustees and was denied.

[page 4]

Discussion

Tomka Requires the Dismissal of Sank's Title VII Claims Against Individual Defendants

Sank's present outstanding claims are brought in part against individual defendants. The claims allege discrimination based upon sex and race in violation of the provisions of Title VII. in part against individual defendants. However, in Tomka, 66 F.3d at 1313-16, the Second Circuit held that individual defendants, even those with supervisory capacity, could not be held personally liable for alleged violations of Title VII. In Houston v. Fidelity National Financial Services, 1997 U.S. Dist. LEXIS 2366, 1997 WL 97838 (S.D.N.Y. 1997), this Court dismissed Title VII claims against individually named defendants on the authority of Tomka. The Honorable Denny Chin and the Honorable Loretta A. Preska reached similar conclusions in Heitz v. Salant Corporation, 1997 U.S. Dist. LEXIS 251, 1997 WL 13241 (S.D.N.Y. 1997) and Benzo v. NYS Division of Human Rights and CUNY, et al., 1997 U.S. Dist. LEXIS 901, 1997 WL 37961 (S.D.N.Y. 1997), respectively. No meaningful distinction in law has been made between the holdings in these authorities and the instant situation. The complaint against the individual members of the Board of Trustees having supervisory control over Sank will therefore be dismissed, leaving the institutional defendant CUNY.

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Further Discovery is Appropriate

Sank has indicated a desire to complete her discovery and such completion is appropriate. Within twenty (20) days she will advise the counsel for the defendant of the requested discovery which will be completed by September 10, 1997. Any disputes will be submitted by letter. The pretrial order will be submitted in the first instance by the defendant to Sank, given her pro se status, on September 17, 1997. Sank will be given two weeks to request any changes, additions or corrections, and the final pretrial order will be filed October 1,

1997. Given the age of this case, further extensions of these deadlines are unlikely.

Counsel Will Be Requested

This order will constitute a request to the Pro Se Office of the Court to seek counsel to represent Sank in view of the trial settings set forth above.

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Conclusion

The individual defendants' motion to dismiss Sank's Title VII claims is granted. Discovery will proceed according to the schedule set forth above.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
June 25, 1997

FILED: June 26, 1997
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 9045 (S.D.N.Y. 6/26/1997)

Stamped
PRO SE OFFICE

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U.S. DISTRIC COURT
FILED
MAR 17 1997
S. D. N. Y.

Stamped
RECEIVED
MAR 20 1997
JUDGE SWEET CHAMBERS

Stamped
RECEIVED
1997 MAR 17 P 10: 19
U.S. DISTRICT COURT
SDNY

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

----------X

DIANE SANK,

Plaintiff,

- against -

THE CITY UNIVERSITY OF NEW YORK, et al.,

Defendants.

NOTICE OF MOTION FOR LEAVE TO FILE AND CERTIFICATION OF A SECTION 1292 INTERLOCUTORY APPEAL OF THE COURT'S FEBRUARY 11, 1997 OPINION

94 CIV 0235 (RWS)

----------X

S I R S / M A D A M S:

PLEASE TAKE NOTICE, that, upon the annexed affidavit of Certification of an Interlocutory Appeal from the Court's February 11, 1997 Opinion.

/HANDWRITTEN DECISION/ *Motion denied. Requested appeal will not expedite the disposition of this action nor are the issues such as to meet the requirements of §1292. /signed/ J Sweet USDJ 4-4-97*

Papers, if any, must be served upon the undersigned no later than seven days prior to the return date of this motion.

Dated: 3-17-97 (Bergen County), New Jersey
(date) March 17, 1997

/s/ Diane Sank

Diane Sank
Plaintiff Pro Se
173 Charlotte Pl.
Englewood Cliffs,
New Jersey 09632

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION
94 Civ. 0253 (RWS)

THE CITY UNIVERSITY OF
NEW YORK, et al.,

Defendants.
----------X.

APPEARANCES:

PROF. DIANE SANK
Plaintiff Pro Se
173 Charlotte Place
Englewood Cliffs, NJ 07632

HON. DENNIS C. VACCO
Attorney General of the State of New York
Attorney for Moving Defendants
120 Broadway
New York, NY 10271
By MARSHA RUBIN, Assistant Attorney General
Of Counsel

[page 1]

Sweet, D.J.,

Plaintiff Diane Sank ("Sank") has moved pursuant to Rule 60(b), Fed. R. Civ. P., for reconsideration of this Court's Opinion dated May 24, 1995 (the "May Opinion") and this Court's order dated November 10, 1995 (the "November Order").

For the reasons set forth below, the motions will be denied.

Background

The parties, facts and prior proceedings are fully set forth in a prior opinion of this Court, Sank v. City University of New York, 1995 U.S. Dist. LEXIS 7021, 1995 WL 314696 (S.D.N.Y. May 24, 1995), familiarity with which is assumed. The May Opinion dismissed Sank's claims for discrimination based on age, religion and disability because those claims had not been raised in Sank's administrative filings and the Court therefore lacked subject matter jurisdiction over those claims. The May Opinion also dismissed, based on the same reasoning, Sank's Title VII claims against Defendants Dr. Beverly Sowande ("Sowande") and the Board of Trustees of the City University of New York (the "Trustees") for the years of 1991 and 1992. Finally, the May Opinion held that relief under 42 U.S.C. § 1983 was time-barred by the three-year statute of limitations governing such claims.

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By Decision and Order dated November 10, 1995, the Court dismissed Sank's claims against defendants the New York City Commission on Human Rights (the "Commission"), Dennis de Leon, Stephanie Orteleiva, Lizbeth Schalet and Rudolph Will (collectively, the "Commission Defendants") on qualified immunity grounds.

On August 6, 1996, Sank filed a motion pursuant to Rule 60(b), Fed. R. Civ. P., for reconsideration/reargument of the November Order dismissing the Commission Defendants and the May Opinion dismissing certain of her Title VII and Section 1983 claims. The motions were considered fully submitted on December 4, 1996.

Discussion

Rule 60(b), Fed. R. Civ. P., establishes grounds on which a court in its discretion may relieve a party from final judgment or order. It provides, in relevant part: "On motion and upon such terms as are just, the court may relieve a party . . . from a final judgment, order or proceeding for the following reasons: (1) mistake, inadvertence, surprise, or excusable neglect; . . . or (6) any other reason justifying relief from the operation of the judgment." Rule 60(b), Fed. R. Civ. P. Our Court of Appeals has instructed that Rule 60(b) is "extraordinary judicial relief" and can be granted "only upon a showing of exceptional circumstances." Nemaizer v. Baker, 793 F.2d 58, 61 (2d Cir. 1986); accord United States v. Bank of New York, 14 F.3d 756, 759 (2d Cir. 1994) (Rule

[page 3]

60(b) relief available only in "extraordinary circumstances") (citing cases). Like a Rule 59(e) motion, a Rule 60(b) motion is not a substitute for an appeal. See Browder v. Director, Dep't of Corrections, 434 U.S. 257, 263 & n.7, 54 L. Ed. 2d 521, 98 S. Ct. 556 (1978).

Rule 60(b) applies only to "final judgment[s]" and not to interlocutory orders. The policy interests underlying Rule 60, securing the finality of judgments, are not implicated by the Court's interlocutory orders. See James by James v. Sadler, 909 F.2d 834 (5th Cir. 1990). The May 1995 Opinion from which Sank seeks relief dismissed only certain, not all, of Sank's discrimination claims and was therefore an interlocutory order, not a final judgment. The November 1995 Opinion, from which Sank also seeks relief under Rule 60(b), dismissed some but not all state defendants and was therefore also an interlocutory order rather than a final judgment.

Accordingly, neither Opinion constitutes a "final judgment" from which Rule 60(b) relief may be considered. See James by James, 909 F.2d at 836 (dismissal order interlocutory where some defendants remained parties to action); Wanamaker v. Columbian Rope Co., 907 F. Supp. 522, 526-27 (N.D.N.Y. 1995) (dismissal of some, but not of

plaintiff's claims was interlocutory order outside "the ambit of Rule 60(b)") (collecting cases).

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In any event, even if the Court were to review the merits of Sank's 60(b) motions, those motions would be denied. Sank has raised no reason for the Court to grant her relief from the Court's earlier Opinion and Order, both of which were amply supported by the law and warranted under the facts of the instant case.

Conclusion

For the reasons set forth above, Sank's motions pursuant to Rule 60(b) are hereby denied. Discovery shall be completed and pretrial orders shall be submitted within 45 days of the issuance of this Opinion.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
February 11, 1997

FILED: February 13, 1997
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 1468 (S.D.N.Y. 2/13/1997)

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

THE CITY UNIVERSITY OF NEW YORK, et al.,

Defendants.
----------X

NOTICE OF MOTION TO DISMISS THE AMENDED COMPLAINT

94 Civ. 0253 (RWS)

Stamped
Received
Nov 22 1994
/initialed/ JS

/HANDWRITTEN ORDER/ *Motion granted on the grounds of immunity as set forth in the authorities stated in memorandum of the Commission defendants. /signed/ J Sweet USDJ 11-10-95*

PLEASE TAKE NOTICE, that, upon the attached memorandum of law, and all papers previously submitted, the undersigned will move this Court, on behalf of defendants the New York City Commission on Human Rights, Dennis deLeon, Stephanie Orteleiva, Lizabeth Schalet and Randolph Wills (collectively, "Commission Defendants"), before the Honorable Robert W. Sweet, United State District Judge, on January 25, 1995, at the United State Courthouse, Foley Square, New York, New York, for an order pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure dismissing the amended complaint against the above-named defendants, and for such other relief as this Court deems proper.

PLEASE TAKE FURTHER NOTICE that, pursuant to Rule 3(c)(2) of the Rules of United States District Court for the Southern District of New York, answering

[page 2]

papers, if any, must be served upon the undersigned no later than seven days prior to the return date of this motion.

Dated: New York, New York
November 22, 1994

Respectfully submitted,

PAUL A. CROTTY
Corporation Counsel of the City of New York
Attorney for the Commission Defendants
100 Church Street, Room 329B
New York, New York 10007
(212) 788-0975

By: /signed/ John P. Stern
John P. Stern (JPS-4304)
Assistant Corporation Counsel

TO: PROFESSOR DIANE SANK
173 Charlotte Place
Englewood Cliffs, N.J. 07632

MARSHA RUBIN
Assistant Attorney General
Office and P.O. Box
120 Broadway
New York, New York 10271

UNITED STATE DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK
----------X
DIANE SANK,

Plaintiff,

- against -

OPINION

THE CITY UNIVERSITY OF NEW YORK, et al.,

94 Civ. 0253 (RWS)

Defendants.
----------X

APPEARANCES:

PROF. DIANE SANK
Plaintiff Pro Se
173 Charlotte Oace
Englewood Cliffs, NJ 07632

HON. DENNIS C. VACCO,
Attorney General of the State of New York,
Attorney for Moving Defendants,
120 Broadway
New York, NY, 10271
By: MARSHA RUBIN, Assistant Attorney General
Of Counsel.

[page 1]

Sweet, D. J.

Defendants Joseph S. Murphy ("Joseph Murphy"), W. Ann Reynolds ("Reynolds"), Dr. Beverly Sowande ("Sowande"), James P. Murphy ("James Murphy"), The Board of Trustees of the City University of New York (the "Board of Trustees") as constituted in the years 1988 through 1992, have moved pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. to dismiss the Title VII claims against them. Defendants Bernard Harleston ("Harleston"), Anthony F. Rodriquez

("Rodriquez"), Jeffrey J. Rosen ("Rosen"), Carol Laderman ("Laderman"), June Nash ("Nash") and Fremont E. Besmer ("Besmer") move pursuant to Rule 12(b)(1) of the Fed. R. Civ. P. to dismiss the Title VII complaints against them on the basis of discrimination due to religion, age and physical disability. Sowande also moves to have all claims against her dismissed for lack of subject matter jurisdiction. For the reasons set forth below, the discrimination claims based upon religion, age, and physical disability are dismissed.

The Parties

Pro se plaintiff, Diane Sank ("Sank"), is a white, Jewish woman, over the age of 66, who walks with the aid of a cane and uses a wheeled luggage cart due to a disability resulting from an accident in 1985. Sank is a Professor of Anthropology who has been employed as such by the City College of the City of New York ("CCNY") since 1968. She was the elected Chair of CCNY's

[page 2]

Anthropology Department for a three year term beginning on July 1, 1987. She served in that capacity until June 1, 1988. Sank is a resident of New Jersey and a citizen of the United States.

Defendant Joseph Murphy was the Chancellor of the City University of New York ("CUNY") from 1987 to 1990.

Reynolds replaced Joseph Murphy as Chancellor of CUNY in September 1990.

James Murphy was the Chair of the Board of Trustees of the CUNY from 1987 throughout the time that the complaint was filed in this action.

Sowande, Associate Counsel in CUNY's General Counsel's Office, was the CUNY Freedom of Information Appeals Officer.

Harleston was the President of CCNY, at all times that he was mentioned in the complaint.

The Board of Trustees of CUNY and its members in 1988 through 1992 includes all of the individual trustees.

Rodriquez was the Assistant Vice President of Facility and Space Planning of CCNY at all times that he is mentioned in the complaint.

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Rosen was the Dean, Division of Social Science of CCNY.

Laderman was the Chair and Professor in the Department of Anthropology (the "Department") of CCNY.

Besmer was Acting Chair in 1989-90 and 1992-93 and Associate Professor of Anthropology at CCNY.

Nash was a Professor (1971 to 1990) and Distinguished Professor (1990 to present) of Anthropology at CCNY.

Prior Proceedings

Sank filed her complaint in this Court on January 18, 1994 and an amended complaint (the "Complaint") was filed on May 27, 1994. This filing followed the events described below. The instant motions were made on October 26, 1994 and heard and marked submitted on February 15, 1995.

Facts

On April 27, 1988 a letter from Harleston to Sank notified her of his decision to discontinue her designation as Department Chairman effective June 1, 1988. Also on April

27, Harleston sent a letter to Joseph Murphy informing him of his decision.

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On May 11, 1988 the office of the Ombudsman at CCNY wrote to Harleston expressing surprise at having action taken with respect to Sank prior to meeting with the Ombudsman. That letter announced a May 18 faculty meeting to consider the matter of the President's actions with respect to Sank and the Department.

Sank promptly (according to her on May 12) pursued administrative remedies complaining about her removal. After being informed in a letter dated May 24, 1988 that the Professional Staff Congress of CCNY could not take the complaint to grievance because "it lacked merit," Sank sent a letter CCNY Dean of Faculty and Staff Relations Silberberg, filing a Step One Grievance against Harleston, the Provost and the Dean of Social Sciences of CCNY (Rosen) for improperly removing her as chair of the Department. This Step One Grievance letter did not mention allegations of discrimination. A September 15, 1988 letter to Silberberg from Sank makes reference to her enclosure of a report on The Status of Women and Faculty Appointment in CUNY.

On July 26, 1988, apparently in response to a letter to him from Sank, Vice Chancellor Bloom, on behalf of Joseph Murphy, sent a letter to Sank advising her that if her grievance got to Phase II it would be thoroughly reviewed.

On October 13, 1988 Silberberg informed Sank by letter that her grievance has been rejected. On December 9, 1988 Sank

[page 5]

received a letter from the CCNY Acting Director of Affirmative Action advising her that "the Grievance Committee has not found a basis for your grievance of gender discrimination."

On June 8, 1989 a meeting of the Department was held to elect a chair for the remainder of the vacant term. The vote was to appoint Besmer as acting Chair. The lack of an appropriate quorum for the vote was successfully challenged through the University grievance process. Besmer was appointed properly by a vote in September. Sank alleges that the railroading of the interim appointment was part of the administration's further evidence of their discriminatory practices.

In a letter dated August 3, 1989 Ira Bloom, Vice Chancellor of CUNY, on behalf of Joseph Murphy, makes reference to Sank's July 12, 1989 letter to Joseph Murphy regarding her problems with the Department. Bloom states that is it not appropriate for the Chancellor's office to get involved at that time.

While continuing to address her complaints within the CCNY and CUNY system, Sank filed a complaint with the New York City Human Rights Commission (the "Commission") in late August 1988. On October 21, 1988 she filed a verified complaint with the Commission charging CUNY, CCNY and Harleston with sex discrimination. A copy of the verified complaint was filed with the Equal Employment

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Opportunities Commission ("EEOC") on September 12, 1989 for dual filing purposes.

On June 27, 1989 Sank filed an amendment to her verified complaint adding charges of race discrimination.

On August 8, 1989 she again amended the complaint to allege the retaliatory seizure and dismantling of her research laboratory in late July. In this amendment she names Rodriguez as a person with whom she discussed the dismantling of her lab and states that "he refused to give me back my lab room, even though there are alternative rooms to

use for other departments." Correspondence between the Sank and the Commission and Rodriguez and Sank discuss his role in the decision to move her lab. Rodriguez was not added to the caption. (In the Court Complaint she alleges that Harleston, Rodriquez, Rosen and Besmer were all responsible for the retaliatory actions and her failure to be warned of same).

On March 3, 1990 she amended the Commission Complaint to add Besmer, the new Chair of the Department who Sank alleges threatened to take her research computer for his own use. Sank alleged in her Commission complaint that Besmer's acts were his way of thanking Harleston for appointing him as acting Chair.

[page 7]

Throughout and after the period that she was filing and amending her Commission complaint, Sank sought information through the Freedom of Information Act from CCNY and CUNY officials. The first letter request during this period was on June 9, 1988 and the last on January 2, 1992.

On July 24, 1991 the Investigator at the Commission indicated on a file memorandum regarding Sank's complaint that there was probable cause and forwarded the complaint to the Commission's Enforcement Bureau.

On January 22, 1993, the Commission issued a written determination and order finding "no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged... "Sank unsuccessfully appealed the Commission's decision. She appealed the decision to the EEOC, which, according to the complaint, rejected the appeal without explanation.

On October 19, 1993 the EEOC issued a determination concurring with the conclusions of the Commission and granting her the right to sue within 90 days.

The Court Lacks Subject Matter Jurisdiction over the Claims of Age Religious Discrimination and Discrimination based on Disability

Filing a charge with the EEOC is a jurisdictional prerequisite to a private civil action under Title VII or under the

[page 8]

employment provisions of the Americans with Disabilities Act the "ADA"). 42 U.S.C. § 2000e-5(e); McDonnell Douglas Corp. v. Green, 411 U.S. 792, 798, 93 S. Ct. 1817, 1822, 36 L. Ed. 2d 668 (1973); 42 U.S.C. § 12117(a); Kent v. Director, 792 F. Supp. 59 (E.D.Mo. 1992) (ADA). Judicial relief cannot be sought for claims not listed in the original EEOC charge unless they are "reasonably related" to the charge. See Butts v. City of New York Dep't of Hous., 990 F.2d 1397, 1401 (2d Cir. 1993); Stewart v. United States Immigration & Naturalization Serv., 762 F.2d 193, 197-98 (2d Cir. 1985); Chojar v. Levitt, 773 F. Supp. 645, 650 (S.D.N.Y. 1991).

In Butts, the Court of Appeals recently described the three types of situations where claims not alleged in an EEOC charge are sufficiently related to the allegations in the charge such that it would be unfair to civil rights plaintiffs to bar such claims in a civil action. The first type of "reasonably related" claim is "essentially an allowance of loose pleading": recognizing that charges are frequently filed pro se, such claims are permitted if the employer conduct complained of would fall within the "scope of the EEOC investigation which can reasonably be expected to grow out of the charge of discrimination." Butts, 990 F.2d at 1402 (quoting Smith v. American President Lines, Ltd., 571 F.2d 102, 107 n.10 (2d Cir. 1978)). The second type is a claim alleging retaliation by an employer against an employee for filing an EEOC charge. Id. The third type is where a plaintiff alleges further

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incidents of discrimination carried out in the same manner. Id. at 1402-03.

Nonetheless, where, as here, the alleged retaliatory termination based on race and gender form the basis of Sank's Commission complaint and EEOC charge, Sank has not alleged facts sufficient to put the EEOC on notice of her religious discrimination or discrimination based on disability claims so as to "trigger the investigatory and conciliatory procedures of the EEOC," the exercise of which underlies the requirement that plaintiffs exhaust their EEOC remedies before pursuing a judicial remedy for a Title VII or an ADA claim. See Chojar v. Levitt, 773 F. Supp. 645, 651 (S.D.N.Y. 1991) (Title VII); Miller v. Smith, 584 F. Supp. 149, 154 (D.D.C. 1984) (Title VII).

Courts in this Circuit have found a lack of subject matter jurisdiction of added claims where such additional claims could not reasonably be expected to grow out of the original charges before the EEOC. In Waterman v. New York Telephone Co., 36 Fair Empl. Prac. Cas. (BNA) 41, 1984 WL 1482 (S.D.N.Y. 1984), the plaintiff checked the box designated "sex" in her SDHR and EEOC charges, and subsequently brought a Title VII action alleging both sex and race discrimination. The court held that it lacked subject matter jurisdiction over the race discrimination claim because plaintiff had not exhausted her administrative remedies with respect to the race claim. See also Drummer, 772 F. Supp. at 826 (under "relation back"

[page 10]

standard applied to untimely amendments to a complaint, claim of religious discrimination does not "relate back" to sex discrimination charge filed before EEOC); Peterson v. Ins. Co. of North America, 1995 U.S. Dist. LEXIS 4739, 1995 WL 217492 at *2 (S.D.N.Y. 1995) ("The Courts will not permit a claim that is based on a wholly different type of discrimination to be brought if it was not initially asserted in the EEOC charge); Dennis v. Pan Am. World Airways, Inc., 746 F. Supp. 288, 291 (E.D.N.Y. 1990) (court dismissed age discrimination

claim under ADEA in Title VII action, where plaintiff asserted racial discrimination and only mentioned having to retire early in her initial EEOC charge). There is no indication in the voluminous submissions made by Sank of discrimination based on religion or disability.[1]

Sank discusses a chilling effect that she felt which made it impossible for her to raise these other claims in fear of retaliation. In her Complaint, however, except for making the conclusory allegations of discrimination on these bases she has provided no concrete examples that would allow the court to find a prima facie case of discrimination on the basis of religion or disability. With this in mind and considering the importance of the notice requirements to the scheme established by Title VII and

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[1] There is an allegation that CCNY denied Sank continued use of a parking space she required after the accident that led to her disability. The events at issue occurred in 1985 and were not alluded to in her Commission complaint. Nothing the Court can find in the Complaint ties the parking space incident to the other allegations made in the Complaint.

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the ADA, this Court lacks subject matter jurisdiction with respect to the religious discrimination claims and the claims of discrimination based on disability and the motion for summary judgment dismissing these claims is granted.

With regard to her allegations of age discrimination, the ADEA provides that:

> No civil action may be commenced by an individual under this section until 60 days after a charge alleging unlawful discrimination has been filed with the Equal Employment Opportunity Commission ...

29 U.S.C. § 626(d).

The Court of Appeals for the Second Circuit has interpreted this provision to require plaintiffs who wishes to bring a discrimination claim under ADEA first to file charges with the EEOC, or in the case of a New York plaintiff, with the Commission. Promisel v. First Am. Artificial Flowers, 943 F.2d 251, 256 (2d Cir. 1991). It is undisputed that Sank did not file an age discrimination claim with the EEOC or the Commission. Nor for the reasons set forth above, can such claim be said to "reasonably relate" to the claims charged in those complaints. Therefore, the Court lacks subject matter jurisdiction over the age discrimination claims.

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There is No Subject Matter Jurisdiction over the Title VII Claims Sowande, and the Board of Trustees of CUNY as Constituted in the Years 1991 and 1992

Sank has brought this action not only against defendants named and involved in the Commission investigation, but also against Joseph Murphy, Reynolds, Sowande, James Murphy, Board of Trustees as constituted in the years 1988 through 1992. They are sued for liability for each of Sank's Title VII causes of action although none of them was named as a respondent in either the Commission Complaint or the EEOC Charge.

Section 706(e) of Title VII provides that "a civil action may be brought against the respondent named in the [EEOC] charge." 42 U.S.C. § 2000e-5 (f)(1). As a general rule, a party not named in the EEOC charge cannot be named in the subsequent civil suit. Drummer v. DCI Contracting Corp., 772 F. Supp. 821 (S.D.N.Y. 1991); Giuntoli v. Garvin Guybutler Corp., 726 F. Supp. 494, 497 (S.D.N.Y. 1989); Seedman v. Alexander's, Inc., 683 F. Supp. 924, 928 (S.D.N.Y. 1987); Allen v. Colgate-Palmolive Co., 539 F. Supp. 57, 69 (S.D.N.Y. 1981); Travers v. Corning Glass Works, 76 F.R.D. 431, 433 (S.D.N.Y. 1977). This notice requirement serves the two important purposes of notifying the charged party of the

asserted violation and permitting the effectuation of Title VII'S primary goal of securing voluntary compliance with the law by bringing the charged party before the EEOC. Travers, 76 F.R.D. at 432 (quoting Bowe v. Colgate-Palmolive, 416 F.2d 711, 719 (7th Cir.1969)).

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None of these "new" parties were named in either the Commission Complaint or the EEOC Charge. Thus, applying the general rule, Sank may not maintain this civil action against any of these "new" defendants.

Sank argues, however, that these parties are amenable to suit under an exception to the general rule. One such exception is that individuals not named in the EEOC charge may be sued in a subsequent civil action if they have been given actual notice that their conduct is being investigated and notice of intent to sue is given to the corporate employer. Seedman, 683 F. Supp. at 928; Allen, 539 F. Supp. at 69.

While it appears that among these moving defendants, at least Joseph Murphy, and perhaps the Board of Trustees in 1989 through 1990 had notice of Sank's dissatisfaction with the way that she was removed as Chair of the Department, there is no indication that Murphy or the Board of Trustees actions were part of the Commission's investigation, nor is it apparent that they should have been. The other named defendants are not mentioned in any of the Commission proceedings. As such, the Court does not have jurisdiction over the Title VII claims naming them.

A second exception is described in Johnson v. Palma, 931 F.2d 203, 209 (2d Cir. 1991); the "identity of interest" exception. This exception "permits a Title VII action to proceed against an

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unnamed party where there is a clear identity of interest between the unnamed defendant and the party named in the administrative charge." Johnson, 931 F.2d at 209. The

Johnson court made no reference to a notice requirement that had been found in earlier cases. In Johnson the Court of Appeals adopted the following four part test to determine whether an identity of interest exists:

> 1) whether the role of the unnamed party could through reasonable effort by the complainant be ascertained at the time of the filing of the EEOC complaint; 2) whether, under the circumstances, the interests of a named party are so similar as the unnamed party's that for the purpose of obtaining voluntary conciliation and compliance it would be unnecessary to include the unnamed party in the EEOC proceedings; 3) whether its absence from the EEOC proceedings resulted in actual prejudice to the interests of the unnamed party; 4) whether the unnamed party has in some way represented to the complainant that its relationship with the complainant is to be through the named party.

Applying these factors, Joseph Murphy, Reynolds, James Murphy and members of the Board of Trustees in 1988 through 1990 may have an identity of interests with the named defendants, particularly CUNY and CCNY.

First, it is clear that Sank could have determined the individually named defendants at the time of her complaint; she knew who they were. As to the second factor, the interests of the named defendants CUNY and CCNY are quite similar to its agents, the Chancellor, the Chair of the Board of Trustees and the trustees themselves. See Minetos v. City Univ. of New York, 875 F. Supp.

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1046, 1051 (S.D.N.Y. 1995) (finding that the unnamed defendants CUNY and a music professor could be sued under Title VII even though only Hunter College and other professors had been named in the EEOC complaint -- "Hunter College is a senior college of the CUNY system while the

Music Professors are agents of Hunter College"); Gilmore v. Local 295, 798 F. Supp. 1030, 1037 (S.D.N.Y. 1992) (unnamed defendant, a regional field manager, had substantial identity with corporate defendant, who was named as respondent in EEOC charge, because he was the agent of the corporate defendant); Bridges v. Eastman Kodak Co., 822 F. Supp. 1020, 1025 (S.D.N.Y. 1993).

Sank suggests in her submissions that notice of her removal as Chair of the Department was put into Joseph Murphy's report to the Board with his approval and forwarded to the Trustees.

As for the third factor, neither defendants nor the facts suggest prejudice to the unnamed parties and since in the end there was no probable cause found it is hard to imagine what prejudice resulted. Finally, Sank has stated that she believed that CUNY stood for the trustees and its employees. While including all employees under the umbrella of CUNY or CCNY is far fetched, it is not unreasonable that the Chancellor or the Board of Trustees could be captured in an allegation against CUNY or CCNY. "The control of the educational work of the city university shall rest solely in

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the board of trustees which shall govern and administer all educational units of the city university." N.Y. Educ. Law § 6204(1) (McKinney's 1985). In addition, since the same Law Department represents the individual defendants and the institutional defendants it is not unreasonable to assume that the Trustees were aware of the legal actions pending against the University and CCNY.

While proving the elements of Title VII claim remain for another day, there is sufficient possibility of identity of interest to preclude dismissing the Title VII claims against these defendants at this time.

Since the acts described in Sank's Complaint that fall under her Title VII claims do not extend past 1990, there is no basis for including members of the Board of Trustees who served only after that time. The claims against them will be dismissed. Finally, neither exception applies to Sowande. The Title VII claims against her are therefore dismissed.

The Court Will Exercise Supplemental Jurisdiction over the Freedom of Information Act Claims Against Sowande

Defendants have moved to dismiss the state law claims against Sowande because there are no federal causes of action pending against her.

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28 U.S.C. § 1367 (a) states that:

> Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include claims that involve the joinder or intervention of additional parties. (emphasis added)

The allegations by Sank against Sowande involving her failure to provide information requested under the Freedom of Information Law are integrally related to Sank's retaliation and discrimination claims against other defendants. Since the underlying jurisdiction is based on federal questions, this Court may exercise discretion in hearing related actions that meet the relatedness test described in United Mine Workers v. Gibbs, 383 U.S. 715, 725, 16 L. Ed. 2d 218, 86 S. Ct. 1130 (1966), 42 U.S.C. § 1367(a); see In re Joint Eastern and Southern District Asbestos Litigation, 14 F.3d 726, 730

n.2 (2d Cir. 1993) ("the court may not exercise supplemental jurisdiction over claims unless the court has 'original jurisdiction' over at least one of the plaintiff's claims").

The claims relating to Sowande are involved in the entire picture of retaliation that Sank has painted in her Complaint. The motion to dismiss these claims on the basis that there is no supplemental jurisdiction over them is denied at this time.

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Claims Under 28 U.S.C. § 1983 are Time Barred

Sank is entitled to bring Title VII and Section 1983 claims when the latter is based on substantive rights distinct from Title VII. Carrero v. New York City Hous. Auth., 890 F.2d 569, 575-76 (2d Cir. 1989).

The statute of limitations for bringing a federal civil rights claim pursuant to 28 U.S.C. § 1983 is three years from the last allegedly discriminatory act. Owens v. Okure, 488 U.S. 235, 102 L. Ed. 2d 594, 109 S. Ct. 573 (1988). The last act directed at Sank and attributed to any of the State defendants in the complaint was in July of 1990, more than three years before this Complaint in this action was filed in January 1994.

The claims against these defendants based on Section 1983 are time barred.

Conclusion

For the reasons discussed above, the claims for discrimination based on age, religion and disability are dismissed,

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the Title VII claims against Sowande and Trustees for the years of 1991 and 1992 are dismissed, and relief under Section 1983 is time barred.

It is so ordered.

/s/ Robert W. Sweet
ROBERT W. SWEET
U.S.D.J.

New York, N. Y.
May 23, 1995

FILED: May 24, 1995
CITATION: *Sank v. City Univ. of N.Y.*, 94 Civ. 0253 (RWS), LEXIS 7021 (S.D.N.Y. 5/24/1995)

EEOC
SEAL

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October 19, 1993

Charge No.: 16F-89-1343

Diane Sank
173 Charlotte Place
Englewood Cliffs, NJ

CUNY City College of NY
Personnel Director
535 East 80 Street
New York, NY

DETERMINATION

Under the authority vested in me by EEOC's regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded to the findings of New York City Commission on Human Rights, which you have previously received.

Having examined New York City Commission on Human Rights' findings and the record presented, I conclude that the evidence obtained during the investigation does not establish violations of the statutes.

This determination concludes EEOC's processing of the subject charge. As the charge alleged a Title VII violation, this is notice that if the Charging Party wishes to pursue this matter further, (s)he may do so by filing a private action in U.S. District Court against the Respondent(s) named above within 90 days of receipt of this Determination. Once this 90 day period is over, the right to sue will be lost. Filing this notice is not sufficient. A complaint must contain a short statement of the facts of this case which shows that the aggrieved party is entitled to relief.

The lawsuit must be filed in U.S. District Court. Generally, suits are brought in the State where the alleged unlawful practice occurred, but in some cases can be brought where relevant employment records are kept, where the employment would have been, or where the respondent has its main office.

If the party cannot afford or is unable to obtain a lawyer to represent him/her, the U.S. District Court having jurisdiction in the case may, at its discretion, assist the party in obtaining a lawyer. If (s)he plans to ask the U.S. District Court to help find a lawyer, (s)he must take this request of the court in the form and manner it requires. The request to the U.S. District Court should be made well before the end of the time period mentioned above. A request for representation does not relieve the party of the obligation to file a lawsuit within this 90 day period.

Contact the EEOC if there are any questions about the legal rights, including advice on which U.S. District Court can hear the case, or if it is necessary to inspect and copy information contained in the case file.

If the suit is filed, send a copy of the court complaint to the office where the charge was filed within 10 days after filing.

The file will then be preserved. Generally, EEOC's rules call for this charge file to be destroyed two years from now unless EEOC is notified that suit has been filed in U.S. District Court.

On behalf of the Commission:

/S. H. L. Jr./

Spencer H. Lewis, Jr.
District Director

Charging Party Copy

EEOC
SEAL

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October 19, 1993

Charge No.: 16F-89-1009

Diane Sank
173 Charlotte Place
Englewood Cliffs, NJ

CUNY City College of NY
Personnel Director
535 East 80 Street
New York, NY

DETERMINATION

Under the authority vested in me by EEOC's regulations, I issue on behalf of the Commission, the following determination as to the merits of the subject charge.

Respondent is an employer within the meaning of Title VII and timeliness, deferral and all other jurisdictional requirements have been met. Substantial weight has been accorded to the findings of New York City Commission on Human Rights, which you have previously received.

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On behalf of the Commission:

/S. H. L. Jr./

Spencer H. Lewis, Jr.
District Director

Charging Party Copy

DETERMINATION AND ORDER
AFTER INVESTIGATION

CITY OF NEW YORK
COMMISSION ON HUMAN RIGHTS
----------X
In the Matter of the Complaint of

DIANE SANK,
Complainant

-against-

Complaint and Amended Complaint No. EM00457-08/24/88-DE, EEOC No. 16F-89-1099

CITY UNIVERSITY OF NEW YORK,
CITY COLLEGE OF NEW YORK,
BERNARD HARLESTON, PRESIDENT
FREMONT BESMER, CHAIR,
ANTHROPOLOGY,
Respondents.
----------X

On October 21, 1988, Professor Diane Sank (Complainant" or "Professor Sank" or "Sank") filed a verified complaint with the New York Commission on Human Rights ("Commission") charging City University of New York ("CUNY") and City College of New York ("CCNY" or "college"), Bernard Harleston, President (the "President") and Fremont Besmer, Chair Anthropology Department, ("Besmer" or "Professor Besmer") with discrimination in violation of the Administrative Code of the City of New York (the "code"). Professor Sank amended her complaint on June 27, 1989, August 8, 1989, and March 3, 1990.

Respondents deny all of Complainant's allegations.

After investigation, the Law Enforcement Bureau ("Bureau") of the Commission has determined that there is no probable cause to believe that respondents engaged in the unlawful discriminatory practices charged in the complaint and amended complaints.

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REMOVAL OF SANK AS CHAIRPERSON

Professor Sank charged in her original complaint that she was illegally removed by the President from her position as Chairperson of the Anthropology department because of the President's discriminatory animus. In her first amendment to the complaint, Professor Sank charged that she was removed from her position because of her race and color (white) in addition to her sex (female).

Respondents claim that Complainant was removed because of a negative Outside Review Committee report and not because of discrimination. The investigation concluded that Professor Sank was removed from her position because of non-discriminatory reasons.

The investigation consisted of a review of documentation interviews with other witnesses as well as a fact-finding conference.

Complainant worked as a faculty member of the Anthropology Department at CCNY. In or about May of 1987, she was elected to the position of Chairperson of the Anthropology Department by her colleagues in the department for the term of July 1, 1987 to May of 1990.

CCNY has used Outside Review Committees ("ORC") to evaluate each department as part of a college-wide evaluation process since 1981. These committees are comprised of professors from other universities. The ORC issues an Outside Review Committee Report ("OCR Report") at the conclusion of its investigation.

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The investigation of Professor Sank's claims required reading and reviewing all fifteen of the ORC reports done at CCNY. The investigation determined from reviewing all of the ORCs that no other ORC report had ever specifically recommended that a Chairperson be removed; and almost no other report was as negative in its evaluation of a department as the ORC report was of the CCNY Anthropology department.

The CCNY Anthropology department was evaluated by the ORC on or about December 3 and 4, 1987 and the report was issued in January of 1988. While the ORC was quite [sic] critical of the Anthropology Department, it also praised the department and all of its faculty members a great deal. Moreover, it clearly and strongly recommended the immediate removal of Complainant as Chairperson of the Anthropology department and that she be replaced with an interim chairperson from outside the department. This report stated:

> Unable to govern itself it (the department) turned to Professor Sank to rescue it by electing her chair. Unfortunately, immediately after her election, she too, being a member of the family, became victim of its collective neurosis....the department which elected her withdrew it collective support. Without that support it has been impossible for her to accomplish anything and she has been reduced to a symbol of the department's own collective malaise.... The department is in a state of crisis and breakdown which it is unable to solve by and for itself. We propose an immediate but interim, solution of semi-receivership for the department....
>
> The most urgent need of the department is for a new outside Chairperson...We recommend in the strongest terms possible, and as absolutely essential to the future of the department, that the College allocate a line
>
> [page 4]
>
> for such a new Chairperson. Pp. 10-12 of the ORC report of the CCNY Anthropology department.

Complainant alleges and Respondents admit that on or about April 27, 1988, she received a letter from President Harleston which informed her of his decision to remove her as the elected chairperson of the department effective June 1,

1988. Professor Sank charged that similarly situated male department chairpersons were not removed from their positions even though they received negative evaluations from the Outside Review Committees and she was differentially treated because of her sex.

The investigation did uncover the fact that in 1982, the President sought to remove Professor John Dean as chairperson of the Architecture department after a negative ORC report. Professor Dean resigned and thus negated the removal by the President. Professor Sank claims that Professor Dean was given the opportunity to resign before being involuntarily removed and that Complainant was not given this same chance because of her sex. Respondents counter that Sank made it clear she would not resign and therefore she was not offered the opportunity.

Professor Sank sent a letter to the President which stated that she disagree with the ORC recommendation concerning her removal as Chairperson. She write [sic] to the President: "I expect to serve my full three year term without interruption." This letter is evidence that Complainant communicated her unwillingness to resign." Further, it substanciates Respondents's [sic] explanation that Professor Sank was not offered the opportunity to resign because it

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was felt that she would not avail herself of the opportunity had it been presented to her.

Complainant also alleges that the President selectively acted on the report's recommendations. Specifically, the ORC report also recommended removal of the Anthropology department secretary; however, the President failed to act on this recommendation. The investigation included a review of the written responses to the ORC report and these responses offer a reason for the President's decision to remove Complainant pursuant to the report and not the department secretary.

Complainant submitted a written response individually, another professor submitted one individually and the other four (of the six) faculty members in the Anthropology

department submitted a joint written response to the ORC report. The four professors stated in their report that they agreed with the recommendation to remove Professor Sank as chairperson but that they disagreed with the recommendation to remove the secretary.

The investigation revealed that the President's decisions to remove both Professor Sank and the secretary were discretionary. At the fact-finding conference, Respondents claimed that it is not the President's role to remove secretaries from their positions, that decisions concerning secretarial staff are handled by the college's personnel department. The investigation uncovered no written policy that indicated whom the President should and should not remove. Additionally, the faculty support for removing Professor Sank and not the secretary supports the President's

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decision in this regard. Finally, the Secretary was a white woman, and if the President was truly biased against white women he may have taken the opportunity to remove the secretary, another white woman. Thus, the fact that the President removed Professor Sank and not the secretary does not lend support to Complainant's allegations.

The Complainant contends that the President's refusal to meet with her to discuss her removal as Chairperson was discriminatory. Complainant contends that the President refused such a meeting despite repeated requests. The investigation concluded that the President's decision not to meet with Complainant was based on nondiscriminatory factors. The investigation included a review of the CUNY Bylaws and specifically the relevant Bylaws, 11.4(b) and 9.1(c) regarding removal of personnel by the President. These Bylaws allow the President to "remove a department chairperson in accordance with section 9.1(c)." Pursuant to 9.1(c), in order to exercise this authority the President must meet with the department and confer with the Board of Trustees prior to the removal. The investigation revealed that the President did meet with the entire Anthropology department on Feb. 28, 1988 and that he also met with the

Board of Trustees. He was not required to meet with Sank individually and thus, he followed the Bylaws with regards to Professor Sank.

Additionally, at the fact-finding conference, the President stated that he did not meet with Complainant because she had already filed a grievance against him concerning the removal issue.

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Therefore, it was inappropriate for him to meet with her and he was advised not to do so by CCNY's legal counsel. A review of the documentary evidence concerning the grievance substantiates that Professor Sank had already filed a grievance. Finally, there is no data with which to compare Professor Sank to determine whether she was disparately treated because of her sex, race and color when the President chose not to meet with her individually.

Complainant also charges that the President's use of the word chairman rather than chairperson, and the omission of her own name, in the letter he sent to her communicating his decision to remove her as chair, were discriminatory. There is no comparable data with which to compare Complainant to in this regard, so it is impossible to engage in a disparate treatment analysis. However, the investigation did reveal that there is no written CUNY or CCNY rule concerning the usage of these words. It certainly may have been more respectful and considerate of the President to have met personally with Professor Sank, to use the word chairperson rather than chairman, and to use her own name when addressing her. However there are no such requirements and these discourteous slights cannot be considered acts of discrimination .

Complainant, in her June 27, 1989 amendment to the complaint, charged that she was removed because of her race and color in addition to her sex. As proof she charges in the complaint that "the President has a publicly stated policy of bias in favor of Black males." Complainant provided a copy of a graduation speech given by the President to support the allegation. The speech in

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part stated that the full education of Black males must be a priority in our society. A review of the speech leads to the conclusion that the President hopes for an equal place for minorities in society but does not state a bias in favor of Black males. No other indication of a publicly stated bias in favor of Black males on the part of the President was discovered during the investigation.

Complainant also charged in this amendment that "... most permanent appointments by the President during his tenure have been Black males." Professor Sank specifically informed the investigator that she meant administrative appointments in this amendment. A review of all of the permanent appointments by the President is not warranted and is not relevant in determining whether or not Complainant was removed pursuant to a report that was critical of the department she chaired. However, it must be noted that the President appointed a white woman (Professor Carol Laderma) as permanent chairperson of the Anthropology department after offering the position to two other white women who refused it. .

Complainant also charges that the President's decision to appoint a Black male, Professor Delmos Jones, as interim chair was an example of discriminatory treatment directed at her or could be used to substantiate her claim regarding the President's bias in favor of Black males. However, the ORC report specifically named three individuals who could successfully serve as interim Chairperson; Delmos Jones was one of them. In the written response

[page 9]

to the ORC, four of the six faculty stated that they felt Professor Jones would be the best person to act as interim Chairperson as he was from the CUNY Graduate Center and could successfully build bridges between the CCNY undergraduate Anthropology department and the CUNY Graduate Center. Complainant points to the fact that the other two individuals specifically named in the ORC report were women and that one was also from the CUNY Graduate

Center to buttress her argument. She claims that these two women were not interviewed for the position.

The decision to appoint Professor Delmos Jones and not one of the two women who were recommended in the ORC report was not an act of discrimination aimed at Complainant. Moreover, the concrete, non-discriminatory reasons for appointing Professor Jones (faculty support and Graduate school affiliation) outweigh Complainant's allegation that Professor Jones' appointment as interim chairperson is evidence of discrimination by the President.

Finally, Complainant points to the election of Professor Besmer, (a faculty member of the Anthropology department during all of the relevant time period) as interim Chairperson, after Professor Jones, as another example of discriminatory treatment and as further evidence of the President's discriminatory bias. Complainant charges in her third amendment to the complaint that "...the President appointed Besmer as Chairperson in direct opposition to the (ORC) committee's recommendations. Therefore, I believe that the College's reasons for my forced removal as Chairperson is pretextual for discrimination, based upon my

[page 10]

membership in a protected class." The Complainant also added Professor Besmer as a respondent with this third amendment.

The investigation of this issue included a review of the letter that Complainant wrote to the President regarding this issue, a review of the grievance that Complainant filed about the issue and another review of the original ORC report. The investigation revealed that Professor Jones decided not to continue as acting chair of the Anthropology department in May of 1989. The department subsequently held an election for the position at which they unanimously elected Professor Besmer acting chair. Complainant filed a grievance because the election occurred during the summer recess and she contended that this was a violation of the union contract. The grievance was decided in her favor by the College and the Anthropology department held another election after the

summer. With the sole exception of Professor Sank's vote, Professor Besmer was again elected to serve as acting chair while the search continued. Consequently, the investigation determined that Besmer was elected and the President did not appoint Besmer as chairperson of the Anthropology department as alleged by Complainant.

Complainant claims that the President should have removed Besmer after the election. However, Besmer was not the subject of the ORC report that discussed Complainant and it was now one year later. Moreover, he was twice elected to serve as acting chairperson and thus had the support of the department.

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In the amendment, Complainant is essentially renewing her earlier allegation that she was removed because of her membership in a protected class and not because an ORC report strongly recommended her removal for the good of the students. The investigation determined that Complainant was indeed removed pursuant to the report's recommendations and-not because-of illegal discrimination by the President. The report was based on site visits and interviews done in early December of 1987, and strongly urged that Complainant be removed immediately,

Consequently, no evidence was uncovered to support Complainant's allegation that she was removed as chairperson of the Anthropology department at CCNY because of her sex, race and color.

RETALIATION

The HRL prohibits retaliation for opposition to perceived unlawful discrimination. A prima facie case of retaliation is established once the complaint shows: (1) she engaged in statutorily protected expression; (2) she suffered adverse employment action; and (3) the existence of a casual link between the protected activity and the adverse employment action.

Complainant, in an amendment to the complaint, alleges that in or about May 1989, her request for a one semester

leave with pay was denied in retaliation for filing grievances with the College and complaints with the Commission against the President.

The investigation revealed that the President was not involved with the decision to deny Complainant a one semester leave with pay. The union contract between CCNY and the CCNY faculty governs

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the process and the decision. Consequently, this retaliation claim must fai1 because there was no causal link between the protected activity and the adverse employment decision.

The investigation included interviews with those who were involved with the decision concerning leave, and it appears that Complainant was not given the leave because there were other requests that were deemed more worthy. However, Paragraph 25.5 of the contract states that "Special consideration shall be given to those applicants who have not had a sabbatical or fellowship within fourteen years." The investigation revealed that Complainant deserved such "special consideration" because she had not taken a leave in 21 years. The interviews conducted revealed that indeed Complainant was not given this "special consideration." This may have been a violation of her union contract. However, there is no evidence to substantiate Complainant's claim that the denial was retaliatory in nature, as the President was in no way involved with the decision.

Complainant also alleges that her research lab was moved to another smaller room in retaliation for filing a complaint at the Commission and a grievance at the College. She alleged also that the college failed to properly notify her about this move and that the process of relocating the laboratory was unfair and inappropriate considering her seniority on the CCNY faculty

Respondents deny that retaliatory animus was the motivating factor in their decision to relocate Complainant's lab. Further, Respondents state that Complainant' s lab was taken to provide the

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computer science department with two contiguous spaces and secondly, that Complainant was underutilizing her space and that the equipment therein was boxed. Complainant countered that (a) the chairperson of the computer science department never specified that two contiguous rooms were needed and that (b) hers was an active lab and continual theft required her to keep her work in boxes.

A review of the documentary evidence submitted and Respondents as well as interviews and a review of relevant affidavits concerning the lab show that Complainant's claim of retaliation with regard to her lab must also fail because again there is no causal link between the protected activity and the adverse employment action. Specifically, the President was unaware of and not involved with the decision to change the room assignment of Complainant's laboratory and thus there -is no link between Complainant's protected activity (filing a complaint at the Commission against CCNY and CUNY) and the adverse employment action (change in Complainant's laboratory space by space advisory committee).

Complainant discovered that the lab had been moved without her knowledge or supervision on July 28, 1989. The investigation determined that there was a letter dated July 21, 1989 and postmarked July 27, 1989 which informed Complainant of the impending move of her lab. Perhaps a senior, tenured professor like Professor Sank should have been shown more consideration with regards to notice, however, the failure to send the letter earlier

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or to call Professor Sank cannot be deemed discriminatory. The investigation revealed that there was a major space reallocation project on the CCNY campus during the fall semester of 1988 and throughout 1989. There were major renovations and construction on the campus around the time and the College instituted a plan to accommodate a severe space shortage that resulted. A space advisory committee was active at the college; Assistant Vice President Rodriguez ("AVP Rodriguez") was in charge of the

replacement of lost classrooms due to construction and the space advisory committee.

Complainant claims that her laboratory was not on the original list of rooms needed for the space reallocation and that the chairperson of the computer science department did not specify a need for two contiguous rooms. However, the investigation revealed that AVP Rodriguez was the individual who made the decision that computer science needed two contiguous rooms and not the computer science department. The investigation uncovered no evidence that AVP Rodriguez knew about Sank's complaint to the Commission or about her grievances at the College. Therefore, it is wholly irrelevant whether computer science needed two contiguous rooms or whether AVP made this decision.

The investigation could not determine the veracity of Respondents assertion that Complainant underutilized her laboratory space, however, such a conclusion is unnecessary because of the lack of a causal link between the protected activity and the alleged adverse employment action' Complainant points to a

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resolution from the Academic Freedom and Faculty Interests Committee ("AFFI resolution") to support her position. The AFFI resolution condemned the college for not consulting with Sank and for making hasty judgments about the underutilization of space by faculty. However, the AFFI resolution specifically found that the lab was not moved because Professor Sank filed a grievance. Thus, both the AFFI investigation and the Commission investigation determined that the changing of Complainant's lab-room was not done in retaliation for engaging in protected activity.

In Complainant's next amendment to the complaint, she alleged that in or about September 1989, she was asked to return her research computer to the department by Professor Besmer and that this was also retaliatory treatment. Respondents asserted that the computer at issue is college property and not the personal property of Sank. They further contend that the computer was purchased with tax-levy money

given to the college and designated for masters degree students in the department, that Sank borrowed it during an intersession break in 1986 and has since refused to return it to the department. Finally, Respondents assert that the computer was needed by the masters degree students in the department,

The investigation revealed that the Executive Committee of the Anthropology department requested that Complainant return the computer on two different occasions so that it could be used by the masters degree students; Complainant twice refused. The Complainant asserts that the department received a new computer in January 1990 and the interim chairperson, Professor Besmer failed to request an

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additional computer even though he had the authority to do so. Complainant thus reasoned that Besmer's request for the return of the department computer was discriminatory.

Complainant's allegation concerning the computer must fail for two reasons. First, the investigation revealed that Complainant has indeed refused to return the computer and still has it in her possession. Therefore, the investigation established that there was no adverse employment action. Secondly, the investigation again failed to uncover evidence supporting a causal link between the alleged adverse employment action and the protected activity. A majority of the department voted twice in favor of Complainant returning the computer to the department's masters degree students. There is absolutely no evidence which suggests the request for the return of the departmental computer was motivated by a discriminatory animus or was due to retaliation.

Upon the foregoing, the complaint is ordered dismissed.

The Complainant may apply for a review of this order by filing a request in writing for such review within thirty (30) days after the date of the mailing of this order. The application should be addressed to the Chairperson, New York City Commission on Human Rights, 40 Rector Street, New York. New York 10006. Please state reasons for applying for the review.

A copy of this Order and Determination has today been sent via certified mail to the parties listed below.

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New York City Commission on
Human Rights
By:_____/S/_____
Randolph Wills, Esq.
Managing Attorney

Law Enforcement Bureau
New York City Commission
On Human Rights
New York, New York 10004

Dated January 24, 1993
New York, New York

Notice to:
Professor Sank
173 Charlotte Place
Englewood Cliffs, NJ 07632

Terry Roemer, Esq.
Office of the General Counsel
And Vice Chancellor for Legal Affairs
City University of New York
535 East 80th Street
New York, NY 10021

U.S. Constitution, Amendment I

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

U.S. Constitution, Amendment IV

The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no warrants shall issue, but upon probable cause, supported by oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

U.S. Constitution, Amendment V

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U.S. Constitution, Amendment XI

The judicial power of the United States shall not be construed to extend to any suit in law or equity, commenced or prosecuted against one of the United States by citizens of another state, or by citizens or subjects of any foreign state.

U.S. Constitution, Amendment XIV

Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Section 5. The Congress shall have power to enforce, by appropriate legislation, the provisions of this article.

28 USC § 1254. Courts of appeals; certiorari; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

28 U.S.C. § 1291. Final decisions of district courts

The courts of appeals (other than the United States Court of Appeals for the Federal Circuit) shall have jurisdiction of appeals from all final decisions of the district courts of the United States, the United States District Court for the District of the Canal Zone, the District Court of Guam, and the District

Court of the Virgin Islands, except where a direct review may be had in the Supreme Court. The jurisdiction of the United States Court of Appeals for the Federal Circuit shall be limited to the jurisdiction described in sections 1292 (c) and (d) and 1295 of this title.

28 U.S.C. § 1331. - Federal question

The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. § 1332. Diversity of citizenship; amount in controversy; costs

(a) The district courts shall have original jurisdiction of all civil actions where the matter in controversy exceeds the sum or value of $75,000, exclusive of interest and costs, and is between—

(1) citizens of different States;

(2) citizens of a State and citizens or subjects of a foreign state;

(3) citizens of different States and in which citizens or subjects of a foreign state are additional parties; and

(4) a foreign state, defined in section 1603 (a) of this title, as plaintiff and citizens of a State or of different States.

For the purposes of this section, section 1335, and section 1441, an alien admitted to the United States for permanent residence shall be deemed a citizen of the State in which such alien is domiciled.

(b) Except when express provision therefor is otherwise made in a statute of the United States, where the plaintiff who files the case originally in the Federal courts is finally adjudged to be entitled to recover less than the sum or value of $75,000, computed without regard to any setoff or counterclaim to

which the defendant may be adjudged to be entitled, and exclusive of interest and costs, the district court may deny costs to the plaintiff and, in addition, may impose costs on the plaintiff.

(c) For the purposes of this section and section 1441 of this title—

(1) a corporation shall be deemed to be a citizen of any State by which it has been incorporated and of the State where it has its principal place of business, except that in any direct action against the insurer of a policy or contract of liability insurance, whether incorporated or unincorporated, to which action the insured is not joined as a party-defendant, such insurer shall be deemed a citizen of the State of which the insured is a citizen, as well as of any State by which the insurer has been incorporated and of the State where it has its principal place of business; and

(2) the legal representative of the estate of a decedent shall be deemed to be a citizen only of the same State as the decedent, and the legal representative of an infant or incompetent shall be deemed to be a citizen only of the same State as the infant or incompetent.

(d) The word "States", as used in this section, includes the Territories, the District of Columbia, and the Commonwealth of Puerto Rico.

28 U.S.C. § 1367. Supplemental jurisdiction

(a) Except as provided in subsections (b) and (c) or as expressly provided otherwise by Federal statute, in any civil action of which the district courts have original jurisdiction, the district courts shall have supplemental jurisdiction over all other claims that are so related to claims in the action within such original jurisdiction that they form part of the same case or controversy under Article III of the United States Constitution. Such supplemental jurisdiction shall include

claims that involve the joinder or intervention of additional parties.

(b) In any civil action of which the district courts have original jurisdiction founded solely on section 1332 of this title, the district courts shall not have supplemental jurisdiction under subsection (a) over claims by plaintiffs against persons made parties under Rule 14, 19, 20, or 24 of the Federal Rules of Civil Procedure, or over claims by persons proposed to be joined as plaintiffs under Rule 19 of such rules, or seeking to intervene as plaintiffs under Rule 24 of such rules, when exercising supplemental jurisdiction over such claims would be inconsistent with the jurisdictional requirements of section 1332.

(c) The district courts may decline to exercise supplemental jurisdiction over a claim under subsection (a) if—

(1) the claim raises a novel or complex issue of State law,

(2) the claim substantially predominates over the claim or claims over which the district court has original jurisdiction,

(3) the district court has dismissed all claims over which it has original jurisdiction, or

(4) in exceptional circumstances, there are other compelling reasons for declining jurisdiction.

(d) The period of limitations for any claim asserted under subsection (a), and for any other claim in the same action that is voluntarily dismissed at the same time as or after the dismissal of the claim under subsection (a), shall be tolled while the claim is pending and for a period of 30 days after it is dismissed unless State law provides for a longer tolling period.

(e) As used in this section, the term "State" includes the District of Columbia, the Commonwealth of Puerto Rico, and any territory or possession of the United States.

42 U.S.C. § 1983. - Civil action for deprivation of rights

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia

42 U.S.C. § 2000e. Definitions

For the purposes of this subchapter—

(a) The term "person" includes one or more individuals, governments, governmental agencies, political subdivisions, labor unions, partnerships, associations, corporations, legal representatives, mutual companies, joint-stock companies, trusts, unincorporated organizations, trustees, trustees in cases under title 11, or receivers.

(b) The term "employer" means a person engaged in an industry affecting commerce who has fifteen or more employees for each working day in each of twenty or more calendar weeks in the current or preceding calendar year, and any agent of such a person, but such term does not include

(1) the United States, a corporation wholly owned by the Government of the United States, an Indian tribe, or any department or agency of the District of Columbia subject

by statute to procedures of the competitive service (as defined in section 2102 of title 5), or

(2) a bona fide private membership club (other than a labor organization) which is exempt from taxation under section 501 (c) of title 26, except that during the first year after March 24, 1972, persons having fewer than twenty-five employees (and their agents) shall not be considered employers.

(f) The term "employee" means an individual employed by an employer, except that the term "employee" shall not include any person elected to public office in any State or political subdivision of any State by the qualified voters thereof, or any person chosen by such officer to be on such officer's personal staff, or an appointee on the policy making level or an immediate adviser with respect to the exercise of the constitutional or legal powers of the office. The exemption set forth in the preceding sentence shall not include employees subject to the civil service laws of a State government, governmental agency or political subdivision. With respect to employment in a foreign country, such term includes an individual who is a citizen of the United States.

(m) The term "demonstrates" means meets the burdens of production and persuasion.

(n) The term "respondent" means an employer, employment agency, labor organization, joint labor-management committee controlling apprenticeship or other training or retraining program, including an on-the-job training program, or Federal entity subject to section 2000e–16 of this title.

42 U.S.C. § 2000e–2. Unlawful employment practices

(a) **Employer practices**

It shall be an unlawful employment practice for an employer—

(1) to fail or refuse to hire or to discharge any individual, or otherwise to discriminate against any individual with respect to his compensation, terms, conditions, or privileges of employment, because of such individual's race, color, religion, sex, or national origin; or

(2) to limit, segregate, or classify his employees or applicants for employment in any way which would deprive or tend to deprive any individual of employment opportunities or otherwise adversely affect his status as an employee, because of such individual's race, color, religion, sex, or national origin.

(j) Preferential treatment not to be granted on account of existing number or percentage imbalance

Nothing contained in this subchapter shall be interpreted to require any employer, employment agency, labor organization, or joint labor-management committee subject to this subchapter to grant preferential treatment to any individual or to any group because of the race, color, religion, sex, or national origin of such individual or group on account of an imbalance which may exist with respect to the total number or percentage of persons of any race, color, religion, sex, or national origin employed by any employer, referred or classified for employment by any employment agency or labor organization, admitted to membership or classified by any labor organization, or admitted to, or employed in, any apprenticeship or other training program, in comparison with the total number or percentage of persons of such race, color, religion, sex, or national origin in any community, State, section, or other area, or in the available work force in any community, State, section, or other area.

(m) Impermissible consideration of race, color, religion, sex, or national origin in employment practices

Except as otherwise provided in this subchapter, an unlawful employment practice is established when the complaining party demonstrates that race, color, religion, sex, or national

origin was a motivating factor for any employment practice, even though other factors also motivated the practice.

42 U.S.C. § 2000e–3. Other unlawful employment practices

(a) Discrimination for making charges, testifying, assisting, or participating in enforcement proceedings

It shall be an unlawful employment practice for an employer to discriminate against any of his employees or applicants for employment, for an employment agency, or joint labor-management committee controlling apprenticeship or other training or retraining, including on-the-job training programs, to discriminate against any individual, or for a labor organization to discriminate against any member thereof or applicant for membership, because he has opposed any practice made an unlawful employment practice by this subchapter, or because he has made a charge, testified, assisted, or participated in any manner in an investigation, proceeding, or hearing under this subchapter.

42 U.S.C. § 2000e–4. Equal Employment Opportunity Commission

(a) Creation; composition; political representation; appointment; term; vacancies; Chairman and Vice Chairman; duties of Chairman; appointment of personnel; compensation of personnel

There is hereby created a Commission to be known as the Equal Employment Opportunity Commission . . . .

42 U.S.C. § 2000e–5. Enforcement provisions

(a) Power of Commission to prevent unlawful employment practices

The Commission is empowered, as hereinafter provided, to prevent any person from engaging in any unlawful

employment practice as set forth in section 2000e–2 or 2000e–3 of this title.

Fed. R. Civ. P., Rule 8. General Rules of Pleading

(a) Claims for Relief.

A pleading which sets forth a claim for relief, whether an original claim, counterclaim, cross-claim, or third-party claim, shall contain (1) a short and plain statement of the grounds upon which the court's jurisdiction depends, unless the court already has jurisdiction and the claim needs no new grounds of jurisdiction to support it, (2) a short and plain statement of the claim showing that the pleader is entitled to relief, and (3) a demand for judgment for the relief the pleader seeks. Relief in the alternative or of several different types may be demanded.

(d) Effect of Failure To Deny.

Averments in a pleading to which a responsive pleading is required, other than those as to the amount of damage, are admitted when not denied in the responsive pleading. Averments in a pleading to which no responsive pleading is required or permitted shall be taken as denied or avoided.

(e) Pleading to be Concise and Direct; Consistency

(1) Each averment of a pleading shall be simple, concise, and direct. No technical forms of pleading or motions are required.

(f) Construction of Pleadings

All pleadings shall be so construed as to do substantial justice.

Fed. R. Civ. P., Rule 10(c). Form of Pleadings

(c) Adoption by Reference; Exhibits.

Statements in a pleading may be adopted by reference in a different part of the same pleading or in another pleading or in

any motion. A copy of any written instrument which is an exhibit to a pleading is a part thereof for all purposes.

Fed. R. Civ. P., Rule 26. General Provisions Governing Discovery; Duty of Disclosure

(a) Required Disclosures; Methods to Discover Additional Matter.

(1) Initial Disclosures.

Except in categories of proceedings specified in Rule 26(a)(1)(E), or to the extent otherwise stipulated or directed by order, a party must, without awaiting a discovery request, provide to other parties:

(A) the name and, if known, the address and telephone number of each individual likely to have discoverable information that the disclosing party may use to support its claims or defenses, unless solely for impeachment, identifying the subjects of the information;

(B) a copy of, or a description by category and location of, all documents, data compilations, and tangible things that are in the possession, custody, or control of the party and that the disclosing party may use to support its claims or defenses, unless solely for impeachment;

(C) a computation of any category of damages claimed by the disclosing party, making available for inspection and copying as under Rule 34 the documents or other evidentiary material, not privileged or protected from disclosure, on which such computation is based, including materials bearing on the nature and extent of injuries suffered; and

(D) for inspection and copying as under Rule 34 any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part

or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment.

(E) The following categories of proceedings are exempt from initial disclosure under Rule 26(a)(1):

(i) an action for review on an administrative record;

(ii) a petition for habeas corpus or other proceeding to challenge a criminal conviction or sentence;

(iii) an action brought without counsel by a person in custody of the United States, a state, or a state subdivision;

(iv) an action to enforce or quash an administrative summons or subpoena;

(v) an action by the United States to recover benefit payments;

(vi) an action by the United States to collect on a student loan guaranteed by the United States;

(vii) a proceeding ancillary to proceedings in other courts; and

(viii) an action to enforce an arbitration award.

These disclosures must be made at or within 14 days after the Rule 26(f) conference unless a different time is set by stipulation or court order, or unless a party objects during the conference that initial disclosures are not appropriate in the circumstances of the action and states the objection in the Rule 26(f) discovery plan. In ruling on the objection, the court must determine what disclosures - if any - are to be made, and set the time for disclosure. Any party first served or otnerwise joined after the Rule 26(f) conference must make these disclosures within 30 days after being served or joined unless a different time is set by stipulation or court order. A party must make its initial disclosures

based on the information then reasonably available to it and is not excused from making its disclosures because it has not fully completed its investigation of the case or because it challenges the sufficiency of another party's disclosures or because another party has not made its disclosures.

(2) Disclosure of Expert Testimony.

(A) In addition to the disclosures required by paragraph (1), a party shall disclose to other parties the identity of any person who may be used at trial to present evidence under Rules 702, 703, or 705 of the Federal Rules of Evidence.

(B) Except as otherwise stipulated or directed by the court, this disclosure shall, with respect to a witness who is retained or specially employed to provide expert testimony in the case or whose duties as an employee of the party regularly involve giving expert testimony, be accompanied by a written report prepared and signed by the witness. The report shall contain a complete statement of all opinions to be expressed and the basis and reasons therefor; the data or other information considered by the witness in forming the opinions; any exhibits to be used as a summary of or support for the opinions; the qualifications of the witness, including a list of all publications authored by the witness within the preceding ten years; the compensation to be paid for the study and testimony; and a listing of any other cases in which the witness has testified as an expert at trial or by deposition within the preceding four years.

(C) These disclosures shall be made at the times and in the sequence directed by the court. In the absence of other directions from the court or stipulation by the parties, the disclosures shall be made at least 90 days before the trial date or the date the case is to be ready for trial or, if the evidence is intended solely to

contradict or rebut evidence on the same subject matter identified by another party under paragraph (2)(B), within 30 days after the disclosure made by the other party. The parties shall supplement these disclosures when required under subdivision (e)(1).

(3) Pretrial Disclosures.

In addition to the disclosures required by Rule 26(a)(1) and (2), a party must provide to other parties and promptly file with the court the following information regarding the evidence that it may present at trial other than solely for impeachment:

(A) the name and, if not previously provided, the address and telephone number of each witness, separately identifying those whom the party expects to present and those whom the party may call if the need arises;

(B) the designation of those witnesses whose testimony is expected to be presented by means of a deposition and, if not taken stenographically, a transcript of the pertinent portions of the deposition testimony; and

(C) an appropriate identification of each document or other exhibit, including summaries of other evidence, separately identifying those which the party expects to offer and those which the party may offer if the need arises.

Unless otherwise directed by the court, these disclosures must be made at least 30 days before trial. Within 14 days thereafter, unless a different time is specified by the court, a party may serve and promptly file a list disclosing (i) any objections to the use under Rule 32(a) of a deposition designated by another party under Rule 26(a)(3)(B), and (ii) any objection, together with the grounds therefor, that may be made to the admissibility of materials identified under Rule 26(a)(3)(C).

Objections not so disclosed, other than objections under Rules 402 and 403 of the Federal Rules of Evidence, are waived unless excused by the court for good cause.

(4) Form of Disclosures; Filing.

Unless the court orders otherwise, all disclosures under Rules 26(a)(1) through (3) must be made in writing, signed, and served.

(5) Methods to Discover Additional Matter.

Parties may obtain discovery by one or more of the following methods: depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property under Rule 34 or 45(a)(1)(C), for inspection and other purposes; physical and mental examinations; and requests for admission.

(b) Discovery Scope and Limits.

Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) In General.

Parties may obtain discovery regarding any matter, not privileged, that is relevant to the claim or defense of any party, including the existence, description, nature, custody, condition, and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. For good cause, the court may order discovery of any matter relevant to the subject matter involved in the action. Relevant information need not be admissible at the trial if the discovery appears reasonably calculated to lead to the discovery of admissible evidence. All discovery is subject to the limitations imposed by Rule 26(b)(2)(i), (ii), and (iii).

(2) Limitations.

By order, the court may alter the limits in these rules on the number of depositions and interrogatories or the length of depositions under Rule 30. By order or local rule, the court may also limit the number of requests under Rule 36. The frequency or extent of use of the discovery methods otherwise permitted under these rules and by any local rule shall be limited by the court if it determines that: (i) the discovery sought is unreasonably cumulative or duplicative, or is obtainable from some other source that is more convenient, less burdensome, or less expensive; (ii) the party seeking discovery has had ample opportunity by discovery in the action to obtain the information sought; or (iii) the burden or expense of the proposed discovery outweighs its likely benefit, taking into account the needs of the case, the amount in controversy, the parties' resources, the importance of the issues at stake in the litigation, and the importance of the proposed discovery in resolving the issues. The court may act upon its own initiative after reasonable notice or pursuant to a motion under Rule 26(c).

(3) Trial Preparation: Materials.

Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including the other party's attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of the party's case and that the party is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical, electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) Trial Preparation: Experts.

(A) A party may depose any person who has been identified as an expert whose opinions may be presented at trial. If a report from the expert is required under subdivision (a)(2)(B), the deposition shall not be conducted until after the report is provided.

(B) A party may, through interrogatories or by deposition, discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under this subdivision; and (ii) with respect

to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) Claims of Privilege or Protection of Trial Preparation Materials.

When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as trial preparation material, the party shall make the claim expressly and shall describe the nature of the documents, communications, or things not produced or disclosed in a manner that, without revealing information itself privileged or protected, will enable other parties to assess the applicability of the privilege or protection.